Supreme Court, U.S.
FILED

98 863 NOV 25 1998

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

LAFAYETTE PLACE ASSOCIATES,
PETITIONER,

v.

CITY OF BOSTON,
RESPONDENT.

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court Of Massachusetts

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Stephen H. Oleskey
Counsel of Record
Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Alan M. Dershowitz
Of Counsel
1575 Massachusetts Avenue
Cambridge, MA 02138-2801
(617) 495-4617

132 pp

TABLE OF CONTENTS

Page

Appendix A (LPA's Petition for Rehearing to SJC) 1

Appendix B (SJC's Opinion) 22

Appendix C (Superior Court's Decision) 61

Appendix D (Special Jury Verdict) 68

Appendix E (Real Property Board Chairman's Letter to Mayor Flynn) 73

Appendix F (Official Minutes of Real Property Board) 76

Appendix G (Letter from Mr. Campeau to Mayor Flynn) 85

Appendix H (Letter from BRA Director to Mr. Campeau) 93

Appendix I (Relative Portions of Tripartite Agreement) 97

Appendix J (Relevant Portions of Amendments to Tripartite Agreement) 122

APPENDIX A

HALE AND DORR LLP
COUNSELLORS AT LAW

60 STATE STREET, BOSTON, MASSACHUSETTS 02109
617-526-6000 • FAX 617-526-5000

STEPHEN H. OLESKEY
617-526-6544
stephen.oleskey@haledorr.com

June 10, 1998

BY HAND

Honorable Herbert P. Wilkins
Chief Justice
Supreme Judicial Court
New Court House
Pemberton Square
Boston, MA 02108

Re: Lafayette Place Associates v. Boston Redevelopment Authority and City of Boston, No. SJC-07596

Dear Chief Justice Wilkins:

This letter is a petition for rehearing of the Court's May 20, 1998 Decision in this matter as it affects the jury verdict and judgment against the City of Boston. The plaintiff, Lafayette Place Associates ("LPA"), respectfully submits that rehearing should be granted because the Court's decision, which departs from settled law on the standard of review for jury verdicts and rests on

misapprehensions as to questions of both fact and law, undermines long-settled principles respecting the sanctity of jury verdicts in Massachusetts, and will adversely effect the willingness of private citizens to do business with, and repose trust in, their government.

1. *The Court Failed To Afford Due Deference to the Jury's Findings*

In vacating the $9.6 million jury verdict against the City of Boston, the Court failed to accord due respect to the deliberations of a jury of twelve Suffolk County residents, who rendered a verdict on nine special questions after sitting through twelve days of evidence, hearing eleven witnesses and reviewing 82 exhibits.[1] As its 28-page decision makes plain, the Court undertook its own independent review and weighing of the evidence in a manner inconsistent both with the deference it has long properly insisted should be accorded to jury verdicts in this Commonwealth, and with the fundamental axiom that the evidence, on appeal, must be construed in the light most favorable to the plaintiff.

The Court's disregard for the jury's verdict and deliberations erodes the basic tenet, incorporated in the Massachusetts Declaration of Rights, Article 15, that "[i]n *all*

---

[1] The unanimous verdict (which, as rendered, totalled $16 million, including a $6.4 million award against the BRA) might be thought the more convincing as the jurors must have understood it would necessarily be paid by them and by their fellow taxpayers. After lengthy briefing and argument on the City's post trial motions, the jury's verdict was thereafter sustained by the trial judge, the Chief Justice of the Superior Court, who heard all the evidence and observed all the witnesses.

controversies concerning property and in *all* suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as shall relate to mariners' wages, the legislature shall hereafter find it necessary to alter it." (emphasis added). Indeed, as this Court has previously observed, "[t]he jury system, as the 'sacred' method for resolving factual disputes, is the most important means by which a layperson can participate in and understand the legal system." *Dalis v. Buyer Advert., Inc.*, 418 Mass. 220, 222 (1994). The jury system serves to bring "'the rules of law to the touchstone of common sense.' . . . 'Jurors bring to a case their common sense and community values, their very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye.'" *Id.* at 222 (citations omitted).

In light of the central importance of the jury process to our system of civil justice, the standard for overturning a jury verdict is a necessarily stringent one: "in this Commonwealth . . . a verdict will not be directed for a party unless the evidence when construed most favorably to the opposite party would not warrant a contrary verdict, or unless evidence by which such opposite party is bound would make impossible a verdict in his favor." *Salem Trust Co. v. Deery*, 289 Mass. 431, 433 (1935); *see also Abraham v. Woburn*, 383 Mass. 724, 727 (1981)(in reviewing the denial of a motion for judgment notwithstanding the verdict, the standard is "whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.'")(citation omitted); *Poirier v.*

Plymouth, 374 Mass. 206, 212 (1978)(same). The Court's decision does not even apply or mention this controlling standard of review.[2]

Indeed, the Court's conclusions — that LPA failed to make an adequate tender of payment to the City and that LPA was not excused from making such a tender by virtue of the City's bad faith actions and stated intentions to abandon the Tripartite Agreement — are particularly troubling given the well-established rule that factual issues relative to the sufficiency of performance under a contract and the materiality of a breach lie peculiarly within the province of the factfinder. *See Boothby v. Texton, Inc.*, 414 Mass. 468, 481 (1993)("The question of satisfactory performance is a question of fact for the jury"); *Charles River Constr. Co., Inc. v. Kirksay*, 20 Mass. App. Ct. 333, 340, n.6 (1985)(question of whether breach was material "was a question of fact for the jury, the answer to which must be upheld if there is support for it in the record.")

---

[2] Notably absent from the Court's 28-page decision overturning the $9.6 million jury verdict is any reference to the appropriate standard of review. The Court's holding only highlights this omission. "The jury returned a special verdict that affirmed that L.P.A. perform[ed] its obligations under the contract. This verdict was incorrect as a matter of law, *given the fact* that LPA fulfilled none of the obligations set out above." *See Lafayette Place Assocs. v. Boston Redevelopment Authority*, 427 Mass. 509, 527 n.23 (1998)(emphasis added). The highlighted language of the footnote is telling: the standard of review applied plainly appears to be the substitution of the Court's view of the facts for the jury's.

a. The Court Erred In Concluding That LPA Did Not Fulfill Its Obligations Under the Tripartite Agreement

LPA respectfully suggests that the Court misapprehended both the law and the facts of the case in concluding that LPA failed to fulfill its obligations under the Tripartite Agreement by virtue of failing to make a sufficient tender. When the record is viewed as a whole, the jury had ample evidence upon which to conclude that LPA stood ready, willing, and able to tender the amount due for the Hayward Parcel and would have done so, had the City and BRA not thwarted its efforts to acquire the parcel.

i. The Evidentiary Requirements For Adequate Tender Are Not Reflected In The Decision

In its opinion, the Court states that "[t]o place a seller in default, a buyer must manifest that he is ready, able, and willing to perform *by setting a time and place for passing papers or making some other concrete offer of performance*." *Lafayette*, 427 Mass. at 520 (emphasis added). Nowhere, however, do the decisions cited by the Court specify the precise manner in which a buyer must demonstrate that it is "ready, able, and willing" to perform, or require that a time and place be designated for the passing of papers. To the contrary, the cases merely require evidence of ability and willingness to make tender and manifestation of such willingness and ability "by some offer of performance." *See Leigh v. Rule*, 331 Mass. 664, 668 (1954); *LeBlanc v. Molloy*, 335 Mass. 636, 638 (1957); and *Mayer v. Boston Metro. Airport, Inc.*, 355 Mass. 344, 350-352,

354-55 (1969). Based on well-settled law, the specificity of the tender and its sufficiency have been consistently regarded by this Court as dependent upon the evidence as a whole.[3]

ii. The Evidence Was Sufficient For The Jury To Conclude That LPA Performed Its Obligations Under the Agreement

Although LPA never claimed that it sent a letter to the City specifying a precise time and place for tender of payment, the jury had before it more than sufficient evidence that LPA was ready, willing, and able to pay the option price for the Hayward Parcel.[4] In this

---

[3] The Court's Decision does not explain why, in light of its own precedent, the specification of time and place should be such critical elements of a tender in these circumstances. Details regarding a specific time and place for tender would have added little of significance to Mr. Campeau's written offer to Mayor Flynn (A811) to "make payment immediately" for the Hayward Parcel insofar as Mr. Campeau's letter appears to be an open invitation for the City to unilaterally select the time and place for tender.

[4] Another example of the Court's misapprehension of the facts is reflected in its comment that "It was also unhelpful of Campeau to send this 'tender' to Mayor Flynn . . ." *Lafayette*, 427 Mass. at 521, n.13. The evidence was undisputed that the City owned the Hayward Parcel, and dealt with LPA through the Real Property Board and Real Property Department, both headed by Commissioner Roche, who reported to Mayor Flynn. (Campeau was also dealing directly with the Mayor on its huge "Boston Crossing" project). Only the City, as owner, not the BRA, as the development entity, could convey the property. (A758-60). This fact was the centerpiece of the BRA's defense to LPA's contract claim against it for breach of the Tripartite Agreement.

regard, the jury heard evidence that LPA repeatedly asked the City to complete the 1978 appraisals of parcel D-4 and New Essex Street, so that the purchase price could be calculated. (A1108, 1126, 2770-2771, 2804-2807). In addition, the jury heard Mr. Ransen, LPA's principal, testify that he would have purchased the Hayward Parcel, whether or not the design review process was completed. (A3360-61). Finally, the jury heard evidence that Campeau, which stepped into LPA's shoes in March, 1988, was ready, willing, and able to purchase the Hayward Parcel in December 1988. (A3748, 3752). On this basis, the jury had more than sufficient evidence upon which to conclude that LPA (and later Campeau) was ready, willing and able to purchase the Hayward Parcel at the option price.

In addition to the evidence heard by the jury, as the Court's Decision recognized at 427 Mass. at 520, LPA sought to introduce into evidence (over repeated objections by the City and the BRA) a letter from Robert Campeau to Mayor Flynn offering to make payment for the Hayward Parcel "immediately." (A811). Such an unequivocal offer to make payment could only have given the jury more evidence upon which to conclude that Campeau was ready, willing and able to perform under the contract.

b. The Evidence Was Sufficient for the Jury to Conclude That Any Tender By LPA or Campeau Would Have Been Futile Given the City's Clear Intention To Abandon the Agreement

Although the Court acknowledges that LPA would be excused from its obligation to tender if "the city's tactics and delays demonstrated that it would not perform under

the contract," *Lafayette*, 427 Mass. at 522, the Court fails to apply the proper standard of review when examining the evidence on that issue, and thereby reaches an erroneous result.

Indeed, the Court, acting as if it were the proper factfinder, actually sifts through the evidence, resolving conflicts in favor of the City, rather than LPA, as required under the appropriate standard of review. For example, the Court interprets the testimony of Marco Ottieri — that LPA would have purchased the Hayward Parcel even if unfavorable zoning was imposed — as seriously weakening the inference that the City's zoning activities with regard to the Hayward Parcel evidenced the City's unwillingness to perform under the Agreement. *Lafayette*, 427 Mass. at 523. Such an inference was not proper since a reasonable factfinder might very well have concluded that evidence of LPA's hypothetical response to the City's zoning activities was irrelevant to a determination whether such activities manifested the City's unwillingness to perform its obligations under the Tripartite Agreement. Alternatively, a reasonable factfinder could have concluded that even though LPA would have proceeded to exercise its option if it believed it could proceed profitably, the City's actions with regard to zoning and otherwise materially affected the transaction. In drawing this inference adverse to LPA, therefore, the Court violated its own rule that "as long as the jury's verdict is supported by reasonable inferences, we will not substitute our interpretation of the facts for theirs." *Abraham*, 383 Mass. at 730.

The Court also ignores or simply fails to draw the permissible inference the jury was entitled to draw in favor

of LPA from other evidence which demonstrated the City's repeated efforts to block the acquisition, including: (1) the City's failure to obtain the appraisals of Parcel D-4 and New Essex Street despite repeated requests from LPA[5] (A1108, 1126, 2770-2771, 2804-2807); (2) the City's active pursuit of plans (continuing through the end of the option period) to build a road through the middle of the Hayward Parcel (A2504-2510, 4457-4459, 4461); and (3) the City's

---

[5] The Court's conclusion that the City's failure to obtain appraisals for D-4 and New Essex Street was immaterial, 427 Mass. at 522, n.15, also directly contravenes the principle that determination of whether a breach is material is a "question for the jury." *Hastings Assocs. Inc. v. Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 171 (1997). *See also Charles River Constr. Co.*, 20 Mass. App. Ct. at 340 n.6.

obstruction of the design review process for Phase II.[6] (A3167-9, 3357, 1112, 3167).

In addition, the Court, in analyzing the factual issue of whether a tender would have been futile, ignores or downplays evidence that the City wished and intended to "abandon" the Tripartite Agreement because it was too favorable to LPA. Such evidence included: (1) statements by BRA Director Coyle that the City wanted a higher value for the Hayward Parcel (A2678, 3185, 3168-69); (2) meeting minutes of the Real Property Board in which the Board "expressed its desire . . . to receive the fair market value for

---

[6] There was substantial evidence that LPA intended from 1978 on to build Phase II and that it believed the success of the mall on Phase I was inextricably related to LPA's ability to construct a department store on the Hayward Parcel. (A2660, 3190, 3387). Moreover, the Second Amendment of February 26, 1982, expressly recognized that the City had *already* demolished the parking garage (A1080); LPA's ability to develop Phase II, was therefore, *not* "contingent upon the City's decision to remove the parking structure" on the Hayward Parcel after that date. (*Cf. Lafayette*, 427 Mass. at 510-11). As a consequence of this misapprehension of facts before the jury, the Court's decision fails to acknowledge the critical fact that completion of Phase II was essential to the success of Phase I, and that it was vital for LPA to acquire the Hayward Parcel to build the second department store needed to make Phase I profitable. (Jordan's was already physically connected to Phase I to the east). While the Court was influenced in its analysis by the failure of Phase I, *id.* at 410, n.2, the jury heard and must have accepted testimony that the failure of Phase I was caused directly by Campeau's actions in deliberately emptying the mall of all tenants preliminary to its planned "Boston Crossing" redevelopment (A3379, 3381-82). The resulting bank foreclosure left LPA with no mall asset and therefore with no reason to seek an "arbitration remedy" for its inability to acquire the Hayward Parcel; without Phase I, it had no reason to acquire Phase II. As the jury understood and accepted, LPA's only recourse thereafter was to pursue first Campeau and then the City for money damages.

the Hayward Parcel (abandoning the Tripartite Agreement)") (A1875); (3) a memo from Chairman Roche of the Real Property Board to Mayor Flynn complaining about the "monetary windfall" that would accrue to LPA if "the BRA and the City allow the sale or transfer to occur" (A2503); and (4) the City's refusal to complete the 1979 appraisals, a necessary predicate to determining the purchase price.[7] Based on such evidence, the jury certainly could have concluded that any tender of payment by LPA would have been futile. *See Hastings Assocs.*, 42 Mass. App. Ct. at 171 ("Once the defendant indicated to the plaintiff that the defendant would not fulfill its obligations, the defendant was in default and the plaintiff was not obliged to go through the 'empty ceremony' of selecting a third party to determine the formula for valuing the business")(citation omitted).

In light of the controlling standard of review — "whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff'" — the Court erred in making its own

---

[7] In a further example of the Court reviewing and assessing evidence heard and weighed by the jury, the Court notes that "The City argues . . . that the appraisals for [D-1 to D-3] sufficed to determine the value of D-4, . . . a very small part of the overall parcel." *Lafayette*, 427 Mass. at 522, n. 15. But the jury surely had the right to weigh this refusal to act, in context, as additional evidence of the City's decision that it would not abide by the contract to sell the land. This is not a trivial evidentiary point, since this appraisal and that of New Essex Street, was unequivocally the City's obligation. (A959). While the City took steps to begin these appraisals, it then stopped suddenly; at trial it offered no explanation for its behavior, a fact which the jury could have viewed as consistent with the City's other actions. (*Cf. id.* at 521-22).

finding that the jury could not have concluded that "the City's tactics and delays demonstrated that it would not perform under the contract."[8] *Lafayette*, 427 Mass. at 522.

2. *The Court's Decision Violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution*

In reaching its result, the Court overlooked settled law concerning the appropriate standard of review to be applied upon review of a denial of judgment notwithstanding a jury verdict. More specifically, the Court conducted its own review of the evidence, drew inferences against, rather than in favor of LPA, discounted or disregarded entirely certain evidence favorable to LPA, and then applied the law to the facts it had improperly determined. In so doing, the Court utterly failed to give the deference to the jury's verdict that is required under the long-standing law of the Commonwealth and the United States and thereby effectively deprived LPA of its right to a jury trial. Indeed, the Court, by virtue of its

---

[8] As a procedural matter, the jury did not even address the issue whether LPA's failure to perform its obligations under the contract was due to "the city's tactics and delays." In fact, the special verdict form instructed the jury *not* to consider the question unless it concluded that LPA *had not* performed its obligations under the Agreement. (*See* A710). Since the jury concluded that LPA *had* fulfilled its obligations under the Agreement, it properly did not address the issue whether LPA was excused from performance. At the very least, LPA is entitled to have a jury pass on the issue whether LPA's alleged failure to make a sufficiently definite tender was the result of the City's actions. This Court, which has not heard the evidence or observed the witnesses, should not determine such a fact-intensive issue.

decision, took LPA's property interest in the Hayward Parcel as set forth in Section 6.02 of the Tripartite Agreement, and gave it to the City of Boston. Such arbitrary and capricious conduct constitutes a violation of LPA's Fourteenth Amendment right to due process.

3. *In Reaching Its Decision, the Court Relied on Legal Issues That Had Not Been Raised With Sufficient Particularity Either at Trial or On Appeal*

The Court's opinion relies on many issues that had not been briefed or raised by the parties in any meaningful way, either in the trial court or in the appellate briefs. The Court's own analysis of such issues contravenes the general principle that issues not raised are waived, *Still v. Comm'r of Employment and Training*, 423 Mass. 805, 808 n.3 (1996), and that issues not briefed on appeal with sufficient adequacy shall not be addressed. *Shafnacker v. Raymond James & Assoc., Inc.*, 425 Mass. 724, 735 n.14 (1997).

a. *The City Did Not Raise in a Timely Fashion the Issue of LPA's Failure to Invoke the Arbitration Clause*

Although the Court faults LPA for failing to avail itself of the arbitration procedure contained in the Tripartite Agreement, a review of the record demonstrates that the City did not assert the arbitration procedure as a defense in a timely fashion as required by Mass.R.Civ.P. 8(c), and therefore cannot be allowed to rely on the arbitration clause to avoid its obligations. The City did not raise LPA's failure to arbitrate as an affirmative defense in its Answer (A39), its Summary Judgment motions (A55,

498), its Statement of Outstanding Issues (A491), or its Trial Memorandum (A575). Indeed, the first reference by the City to arbitration came at the end of all the evidence at the trial, after more than two years of litigation, including substantial discovery.[9] Moreover, the law is settled that by proceeding through discovery and trial, the City waived its right to resort to arbitration. *See Home Gas Corp. of Mass., Inc. v. Walter's of Hadley, Inc.*, 403 Mass. 772, 778 (1989)(right to arbitration waived after one year of discovery, fourteen-day hearing and report by master).

---

[9] The City filed no motion for a Directed Verdict at the close of LPA's case. The City's first claim that arbitration was LPA's only remedy came in its Requested Jury Instructions (A698); when they were not given, the City failed to preserve its rights by not objecting.

b. The City Never Challenged the Trial Court's Instructions to the Jury On LPA's Performance Under the Tripartite Agreement

Although the Court holds that LPA's failure to invoke the procedural remedies in the Tripartite Agreement precludes it "as a matter of law" from putting the City in default, the record indicates that the jury was not so instructed and that the City voiced no objection to the trial court's instruction as to LPA's obligations under the Tripartite Agreement:

> Question 2: Did LPA perform its obligations under the contract? Did LPA do what it was supposed to do? Did it do what it was supposed to do pursuant to the terms and conditions of the contract? One cannot seek to enforce a contract unless one lives up to and meets its obligations under the contract.

(A4688).

c. The City Never Challenged the Trial Court's Instructions on the Issue Of Whether LPA Was Excused from Performing By Virtue of the City's Conduct

Similarly, although the Court analyzes the issue whether the evidence could have supported a finding that LPA was excused from tendering payment by virtue of the

City's conduct, the record demonstrates that the City failed to object to the following instructions given by the Court:

> The question is: If LPA did not perform its obligations . . . under the contract, was its failure to perform caused solely — by that it means was the only cause, the only cause for its failure to perform — was its exclusive cause for its failure to perform a material breach by the City of Boston. In other words, did the failure of the City of Boston to meet its obligations under the contract, was that the cause . . . of LPA not meeting its obligations under the contract.

(A4688-89). Nor did the City request any further instructions on LPA's obligations under the Tripartite Agreement. Under such circumstances, the City should not even be allowed to raise this issue on appeal and this Court certainly should not rely on the issue as dispositive of a multi-million dollar jury verdict which followed instructions as to which no objection was made.

4. *The Court's Decision, Which Holds Private Parties to a Heightened Standard of Care When Transacting Business With Governmental Entities, Is Not Supported by Settled Precedent and is Unsound and Unfair Judicial Policy*

The Court's decision rests in significant measure on the principle that commercial transactions involving municipalities require different standards from those between private parties. More specifically, in reaching the conclusion that LPA failed to make an adequate tender of

payment for the option parcel, the Court relies upon dicta in a 1920 United States Supreme Court decision involving Internal Revenue Service procedure, which states that, "'Men must turn square corners when they deal with the Government.'" *See Lafayette*, 427 Mass. at 524 (*quoting Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920)). Moreover, the Court places special emphasis on citizens being "particularly assiduous" in using available "procedural devices" in transactions involving government "particularly . . . in a complex and heavily regulated transaction . . . where public entities and public and elected officials with changing policies and constituencies are involved, and the transaction spans many years." *Lafayette*, 427 Mass. at 523-24. Finally, in the portion of the opinion rejecting LPA's 93A claims against the City and BRA, the Court stated even more starkly: "It is perfectly possible for a governmental entity to engage in dishonest or unscrupulous behavior as it pursues its legislatively mandated ends." The Court has apparently overlooked its decision in *Commonwealth v. Boston Redevelopment Authority*, 418 Mass. 29, 32, n.3 (1994), in which it summarily rejected the BRA's transparent effort to advance its "legislatively mandated ends" through actions intended to force the Commonwealth itself to renegotiate the purchase price for the land for the new courthouse. *Cf. Lafayette*, 427 Mass. at 535-36.

These principles are contrary to well-settled and well-reasoned precedent in the Commonwealth that, in contract actions, the state "will be held answerable 'exactly as though it were a private individual.'" *Minton Const. Corp. v. Commonwealth*, 397 Mass. 879, 880 (1986); *Babcock Coal Co. v. Boston*, 303 Mass. 518, 521 (1939)(finding general commercial contract rules apply "to municipalities equally

with other buyers"); *Space Master Intern., Inc. v. City of Worcester*, 940 F.2d 16, 19 (1st Cir. 1991)("Massachusetts applies general principles of contract law to public contracts"); *see also Bromfield v. Treasurer & Receiver General*, 390 Mass. 665, 669 (1983)("The presumption exists that the Commonwealth will honor its obligations.")

Indeed, the City did not even dare to argue below that it should be treated other than as a private citizen in this context, and in fact requested the following instruction be given to the jury at trial:

> For the purpose of your deliberations, it makes no difference, and you should not consider, that the City of Boston . . . is . . . a large municipal entity. The City is entitled to rely on its legal rights to the same extent as any individual person. Just as an individual's means are irrelevant to your determination of his or her legal rights and obligations, so are those of the City . . .. *All persons, including the City of Boston . . ., stand equal before the law and are to be dealt with as equals in a court of justice.*

(A659)(emphasis added).

That elected officials, their "constituencies" and "policies" change over time ought in truth to be all the more reason for citizens to be able to enforce contracts made by one administration on behalf of a city against that city later, no matter what changes elections have wrought. Here, one Mayor, Kevin White, his BRA Director, Robert Kenney and his Real Property Commissioner, Joanne Prevost, in a contract approved by the City Council,

squarely committed the City and its agencies in 1978 to sell property to LPA at a much later date so long as LPA built Phase I and became entitled to trigger its Phase II option — the carrot dangled by the City in its successful effort to induce LPA to invest well over $100 million in a highly risky ten-year commitment in a vital but decrepit portion of the City's Central Business District. Ten years later, with a new Mayor, Raymond Flynn, a new BRA Director, Stephen Coyle, and a new Real Property Commissioner, Edward Roche, "constituencies" and city "policies" had most assuredly changed. In such foreseeable and repetitive circumstances, requiring government, like private citizens, to live strictly with its contractual commitments, particular with those agreements successor officials perceive and publicly proclaim to be no longer advantageous enough to perform, should be a judicial imperative.

The import of the Court's decision — that government in the pursuit of its objectives will be given a latitude to conduct itself in a manner that would be unacceptable and sanctionable in a private citizen (cf. *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 475 (1991), cited by the Court in *Lafayette* at 535) — is not only contrary to all citizens' reasonable expectations that government will (as it should) behave decently and honestly in its dealings with them, but is also a highly disturbing principle and precedent for this Court to advance.

For all of the above-stated reasons, LPA respectfully requests that the Court grant its petition for rehearing. LPA requests oral argument on its petition.

Very truly yours,

Stephen H. Oleskey
Lisa J. Pirozzolo

cc: David Wanger, Esq.
Rory Fitzpatrick, Esq.
Saul A. Schapiro, Esq.

APPENDIX B

LAFAYETTE PLACE ASSOCIATES *vs.* BOSTON REDEVELOPMENT AUTHORITY & another.[10]

Suffolk, March 9, 1998. — May 20, 1998.

Present: WILKINS, C.J., ABRAMS, LYNCH, GREANEY, FRIED, MARSHALL, & IRELAND, JJ.

Contract, What constitutes, Construction of contract. Performance and breach. *Boston. Redevelopment Authority. Municipal Corporations,* Contracts. *Governmental Immunity. Massachusetts Tort Claims Act. Consumer Protection Act,* Unfair or deceptive act, Trade or commerce.

The terms of an agreement, as amended, between the city of Boston, the Boston Redevelopment Authority, and a developer were sufficiently definite to constitute a valid and enforceable contract [517-519], however, where a bilateral contract for the purchase and sale of a certain parcel of real estate arose upon the developer's exercise of an option under the agreement and where, thereafter, neither the developer nor the city tendered performance, neither party was in breach or default of the agreement, which then expired by its own terms [519-527]

In a civil action, the judge did not abuse his discretion in ruling that the Boston Redevelopment Authority had timely raised the defense of immunity under the Massachusetts Tort Claims Act, G.L. c. 258, § 10(*c*). [527-528]

---

[10] City of Boston.

This court concluded that the Boston Redevelopment Authority is a public employer under the Massachusetts Tort Claims Act, and, as such, the provisions of G.L. c. 258, § 10(*c*), confer upon it immunity from liability for intentional torts. [528-535]

In a G.L. c. 93A claim brought by a developer against the city of Boston and the Boston Redevelopment Authority, the judge correctly allowed the defendants' motion for summary judgment where the defendants' transactions with the plaintiff were wholly in pursuit of the legislatively prescribed redevelopment mandate of G.L. c. 121A, § 2, and did not constitute "trade or commerce." [535-536]

CIVIL ACTION commenced in the Superior Court Department on March 16, 1992.

A motion for summary judgment was heard by *Hiller B. Zobel*, J., and the case was tried before *Robert A. Mulligan*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Stephen H. Oleskey (*Lisa J. Pirozzolo* with him) for the plaintiff.

Saul A. Schapiro (*Nina F. Lempert* with him) for Boston Redevelopment Authority.

Rory FitzPatrick (*Irene C. Freidel* & *Merita Hopkins* with him) for the city of Boston.

FRIED, J. A jury found the defendants, the city of Boston (city) and the Boston Redevelopment Authority (BRA), liable for monetary damages for having breached a contract with the plaintiff, Lafayette Place Associates (LPA), for the sale of certain land (Hayward Parcel), and the BRA liable for the tort

of intentional interference with LPA's contractual relation with another entity, Campeau Massachusetts, Inc. (Campeau). The trial judge entered judgment against the city, and granted judgment notwithstanding the verdict in favor of the BRA, on the ground that it was not amenable to suit for an intentional tort. We conclude that there was a valid contract between the city and LPA but that the city did not breach it. We also affirm the judgment entered in favor of the BRA, and the dismissal of LPA's claims under G.L. c. 93A.

I

This dispute arises out of efforts going back to the administration of Boston Mayor Kevin White in the late 1970's to rehabilitate the "Combat Zone," a dilapidated area adjacent to a shopping area on Washington Street. A grand scheme was devised by LPA's entrepreneurs for the construction of a department store, a retail mall, and a hotel in the area. In 1978, an agreement (Tripartite Agreement) was signed between LPA, the city, and the BRA for the development of the area in two phases. Phase I was to encompass a shopping mall and a hotel and was eventually built.[11] It is not a subject of these suits. Phase II was to include one or more office buildings, further retail space, and a department store. It was to be built on four parcels of land to be assembled into a single parcel, called the Hayward Parcel, at the time partially occupied by a city parking structure, the Hayward Place parking garage. Whether Phase II would ever be undertaken was made contingent in the

[11] The shopping mall, Lafayette Place Mall, was not a success. The bank that held the mortgage foreclosed on it on February 5, 1991. The hotel, originally known as the Lafayette Hotel, has been operating successfully as the Swissôtel and separated itself from the development.

Tripartite Agreement on the city's decision to remove the parking structure. If it did, the city would still be allowed to build an underground parking garage on the site with LPA being granted air rights to build over it.

The agreement as to the development of the Hayward Parcel was principally set out in Section 6.02 of the Tripartite Agreement. Section 6.02 is expressed in terms of the grant of an option to LPA to purchase the Hayward Parcel. The option is contingent on notice by the city that it plans to discontinue the Hayward Place garage. By agreement, LPA could thereupon notify the city within the option period if it "desires to purchase the rights hereby made available to it [and] the City shall sell the same . . ." The Tripartite Agreement and accompanying maps identify the boundaries of the Hayward Parcel, but indicate several alternatives concerning the rights to be conveyed. In the Tripartite Agreement, the city is stated to have in hand appraisals of the fair market value of two of the four component parcels of the Hayward Parcel, and agrees "forthwith" to obtain appraisals of the two remaining parcels.[12] The price to be paid was to be one-half of the appraised fair market value as of 1978, plus one-half of the increase in value attributable to "the construction of the Public Improvements and the Project."[13] In other words, the formula accounted for the possibility that between 1978 and the future sale of the Hayward Parcel, the value of the parcel could change as a result of the

[12] The city completed an appraisal of the third parcel in 1979.

[13] This was the formula to be used if the city ultimately determined, as it in fact did, that it would retain subsurface rights to build a parking garage under the Hayward Parcel. Had the city decided not to retain subsurface rights, an alternate formula provided that the purchase price would be the full fair market value as of 1978 plus one-half of any increase in value attributable to the construction of "the Public improvements and the Project."

construction of Phase I on adjacent land. The Tripartite Agreement further provided that "[t]he existence and amount of increase in fair market values attributable to the construction of the Public Improvements and the Project shall be determined by independent appraisal." Section 13.01 of the Tripartite Agreement also provides, after giving a standard definition of fair market value, that such value shall be determined by a procedure, akin to arbitration, by which by giving written notice either party may designate a first appraiser, the other party designate a second appraiser, and a third appraiser be appointed by the first and second, by the Chief Judge of the United States District Court for the District of Massachusetts, or by the president of the Boston Bar Association.[14]

The Tripartite Agreement also provides,

> "[t]he Developer may exercise the right and option set forth in this Section 6.02 by giving notice of its desire to purchase such rights to the City at any time within the Option Period. After the receipt of and following such notice from the Developer, the parties shall in good faith negotiate and enter into an agreement calling for the purchase and sale of the rights in question. Such agreement shall be in the customary form of agreements for the purchase and sale of real estate in the greater Boston area except that the agreement shall reflect such reservation and shall contain other appropriate provisions with respect to

---

[14] This appraisal process was to be used to determine the fair market value of the "project rights," which included the "Developer's present and future rights in and to the Project Area." The "project area" included parcels D-1, D-2, D-3, and DA, which made up the Hayward Parcel.

> the integration of construction and other matters relevant to coordinated use of the rights conveyed and the rights retained by the City."

On February 26, 1982, the parties agreed, in what is known as the Second Supplemental Agreement, to certain changes to the Tripartite Agreement concerning the construction and operation of a parking garage by the city under the Hayward Parcel. In addition, the parties amended Section 6.02 by adding the following:

> "[I]f the Developer shall exercise the right and option set forth in this Section 6.02, there shall automatically be created an agreement by the Developer to buy and by the City to sell the . . . Parcels . . . . [A]ppropriate details of the purchase and sale shall be worked out by the parties so as to conform to their intent under this Section 6.02., but if they shall be unable to do so then the matter shall be resolved by arbitration in accordance with the arbitration procedure set forth in ARTICLE EIGHT of the Deed and Agreement, dated as of September 11, 1979, between the City and the Developer."

Article 8 of the deed sets out a binding arbitration procedure for the resolution of disputes.[15] On December 16, 1983, the city gave notice to LPA that it intended to discontinue the Hayward Place Garage and build a parking garage beneath

---

[15] The September 11, 1979 deed, which was for the purchase of the "Lafayette Parcel" in connection with Phase 1, provides that "[i]f a dispute shall arise . . . and if . . . such dispute is to be settled by arbitration, then either Owner may serve upon the other Owner a notice demanding that the dispute be arbitrated . . . ." Each party is permitted to select an arbitrator, and the two chosen arbitrators then select a third.

the Hayward Parcel, thereby commencing LPA's option period. In that notice, the city listed five contingencies to closing the sale of the Hayward Parcel, including that "the parties are able to agree, via appraisals, on the increased value of parcels D-1, D-2 and D-3, as the result of the construction of the Lafayette Place Project."

On July 2, 1986, as all parties agree, LPA exercised its option to purchase the Hayward Parcel. On October 27, 1987, the parties extended the date on which closing might take place by providing, in what is known as the Third Supplemental Agreement, that:

> "Section 6.02 of the Tripartite Agreement is amended by deleting the proviso in the fourth full paragraph thereof . . . and substituting in its place the following: 'provided that, unless the City and the Developer shall agree to a further extension, the Developer shall lose its rights hereunder to proceed with an acquisition if a closing has not occurred by January 1, 1989, unless the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing.' "

By virtue of the Third Supplemental Agreement, LPA had until January 1, 1989, a date which all parties refer to as the "drop dead date," to "proceed with an acquisition."

LPA never demanded and the city never tendered a deed within the required time period or at any other time. The basis of its contract action against the city is that the city in bad faith failed to carry out those of its obligations under the Tripartite Agreement necessary to allow LPA to proceed to demand a closing, and indeed that it engaged in bad faith actions designed to impede LPA in effecting a timely closing. The reason for these obstructionist tactics by the city, as LPA

sought to show by testimony and documents, was that the new administration of Mayor Raymond Flynn believed that the price established by the Section 6.02 formula, which was based on 1978 values, was grossly unfair to the city in the light of a strong surge in real estate prices in the intervening years. LPA offered evidence of several instances of what it claimed were the city's obstructionist tactics. These included failing to complete the appraisals necessary to establish the price for the Hayward Parcel, initiating zoning changes that would have greatly reduced the allowable height of the office towers planned for the site, lack of cooperation about determining whether Avenue de Lafayette and New Essex Street would be closed, and threatening to put a new street through the middle of the parcel, which would have made its development economically unviable.

In November, 1987, after the conclusion of the Third Supplemental Agreement but before the final breakdown of dealings in 1989, LPA negotiated the sale of its development rights in the Hayward Parcel to Campeau. LPA was to receive $24.5 million in return for its rights under Phase I of the project. The sale was subject to approval by the BRA, and on December 4, 1987, LPA filed an application for approval. On February 1, 1988, LPA withdrew its application; the BRA had not acted on it in the interim. In March, 1988, LPA entered into a lease agreement with Campeau whereby Campeau assumed LPA's debts under Phase I and was to pay LPA approximately $21.5 million in cash and notes in return for LPA's rights to the project. Under the lease agreement, Campeau agreed to pay LPA additional consideration if the BRA approved the sale of the Hayward Parcel.

Thereafter, LPA was not directly involved in negotiations regarding the sale of the Hayward Parcel. Campeau began elaborate plans for a development called "Boston Crossing,"

which included construction of a department store and office tower on the Hayward Parcel, the rebuilding of the Phase I mall on its nearby parcel, and the construction of an office tower above a rebuilt Jordan Marsh. During 1988, representatives from Campeau and the BRA met repeatedly to negotiate about Campeau' s plans. When it became clear that Campeau could not secure BRA approval for the Boston Crossing project by the expiration of LPA's option period, Campeau requested a further extension of the drop dead date. The BRA refused to extend the January 1, 1989, deadline. On December 19, 1988, Campeau's president sent a letter to Mayor Flynn describing the current state of the project, renewing Campeau's request for an extension of the option period, and informing Mayor Flynn that "we have no recourse but to officially notify the city that we wish to complete the transaction and make payment immediately." On December 30, 1988, Stephen Coyle, director of the BRA, responded. He stated that, "once the development review process is complete, the City's parcel can be sold for its fair reuse value," and noted that "[b]y their own terms, prior agreements on Hayward Place will expire on January 1, 1989. This event does not in our judgment alter our willingness to work with you . . . [i]t simply puts the question of the disposition of Hayward Place in a current context."

LPA's option period expired on January 1, 1989. In June, 1989, the BRA approved Campeau's "Boston Crossing" design, but by June, 1990, Campeau had defaulted on its payments to LPA under the lease agreement and LPA terminated its lease with Campeau. Manufacturers Hanover Trust Company, as lender, foreclosed on LPA's and Campeau's interests in the Lafayette Place Mall in February, 1991, and the project collapsed. On March 16, 1992, LPA filed suit

against the city and the BRA.[16] LPA alleged that the city had breached the Tripartite Agreement by failing to work out the necessary details to effect the transfer of the Hayward Parcel after LPA exercised its option to buy, and LPA sought specific performance, or, alternatively, damages for breach of the Tripartite Agreement. LPA also sought damages for breach of the implied covenant of good faith and fair dealing, interference with contractual relations, and violation of G. L. c. 93A.

On October 21, 1994, a jury returned a verdict against the city and the BRA. The jury found that there was a contract for the purchase of the Hayward Parcel, that both the city and the BRA breached the contract, but that the BRA was not acting as an agent of the city in connection with the contract. The jury awarded LPA $9.6 million against the city. The jury also found that the BRA intentionally interfered with contractual relations between LPA and Campeau, and awarded LPA $6.4 million in damages. The trial judge then ruled that the $6.4 million verdict against the BRA was "encompassed" within the $9.6 million award against the city. On August 17, 1995, the judge granted the BRA's motion for

[16] On July 18, 1990, LPA had filed suit against Campeau, alleging that Campeau had failed to use "commercially reasonable efforts" to go forward with Phase 11, and therefore had violated the lease agreement between LPA and Campeau. in addition, LPA alleged that Campeau had failed to pay amounts due under the lease. The record does not reflect the disposition of this action.

judgment notwithstanding the verdict,[17] ruling that the BRA is a public employer under the Massachusetts Tort Claims Act and is therefore immune from suit for intentional torts. We granted LPA's application for direct appellate review.

II

The city makes two principal arguments in this appeal: that the Tripartite Agreement was too indefinite to constitute a binding contract, and that in any event the city was not in breach. Although the city treats these as quite distinct arguments we believe that they must be considered together to come to a fair and sensible view of the arrangement between the parties and their dealings with each other pursuant to it. There were certainly contingencies left open at the time that the parties concluded the Tripartite Agreement, principally the price to be paid, the treatment of Avenue de Lafayette and New Essex Street, and whether or not the city would choose to build an underground garage on the Hayward Parcel. But these open matters did not preclude the formation of a binding agreement. The parties specified formulae and procedures that would determine a price under the several contingencies. It would be most unfortunate if parties could not make binding, reliable agreements about such complex projects, allowing them to make commitments and seek financing for their conclusion. If the degree of

[17] The judge had earlier ruled that the judgment against the BRA for breach of contract could not stand because it was inconsistent with the jury's specific finding that the BRA was not an agent of the city, and that the award of dam- ages in tort against the BRA could not stand because they were subsumed in the contract damages awarded against the city. A claim against the defendants under G. L. c. 93A had been dismissed on motion for summary judgment prior to the commencement of the trial.

specificity the city claims is necessary were insisted on, no such agreements could be concluded. But it is the other side of this same coin that the procedures necessary to lend specificity to what at the outset is not entirely specific are an integral part of the agreement the parties concluded, and, if a party does not follow those procedures, it should not be able to claim that the other side is in breach of what is necessarily still an open-ended arrangement. We conclude that there was sufficient evidence to find a binding agreement, as the jury indeed did find, but it is also clear, as a matter of law, that LPA failed to follow the steps required of it under the Tripartite Agreement as supplemented to put the city in breach.

A

The first question is whether there was a valid and enforceable contract between LPA and the city or whether, as the city claims, the terms of the Tripartite Agreement as amended were too indefinite to constitute a contract. The Tripartite Agreement states that "the parties shall in good faith negotiate and enter into an agreement," which the city argues indicates that no binding agreement had been concluded. The city points out that Section 6.02 leaves undetermined the contract price and exactly what is to be included in the Hayward Parcel. In some cases, the failure to reduce uncertainties to definite terms is fatal, particularly where parties have not yet formalized their negotiations or have left essential terms completely open. See *Mendel Kern, Inc.* v. *Workshop, Inc.*, 400 Mass. 277, 280-281(1987) ("an intention to do something is not necessarily a promise to do it"); *Lucey* v. *Hero Int'l Corp.*, 361 Mass. 569, 574 (1972) (no option contract for purchase of land where parties merely specified boundaries to be "mutually agreed upon by both

parties"); *Saxon Theatre Corp. v. Sage*, 347 Mass. 662, 666 (1964) (no contract for lease of property where parties merely signed letter of intent that provided no description of the land nor means of determining rent). But see *Shayeb* v. *Holland*, 321 Mass. 429, 431(1947) (enforcing contract despite absence of price term). We adhere to the principle that "[a]n agreement to reach an agreement is a contradiction in terms and imposes no obligation on the parties thereto," *Rosenfeld* v. *United States Trust Co.*, 290 Mass. 210, 217 (1935), in the circumstances that justify and gave rise to it: where parties have merely reached the stage of "imperfect negotiation" prior to formalizing a contract, and have not yet reduced their agreement to terms. *Id.* When parties have progressed beyond that stage, however, a competing principle applies: a contract should be interpreted "so as to make it a valid and enforceable undertaking rather than one of no force and effect." *Shayeb* v. *Holland*, *supra* at 432. See *McMahon* v. *Monarch Life Ins. Co.*, 345 Mass. 261, 264 (1962).[18] Rules of contract must not preclude parties from binding themselves in the face of uncertainty. If parties specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow present uncertainties to rights and obligations, their agreement is binding. See generally *Hastings Assocs.* v. *Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 169 (1997) (accepting contract calling for appointment

[18] As Judge Leval has said, "Notwithstanding the importance of protecting negotiating parties from involuntary judicially imposed contract, it is equally important that courts enforce and preserve agreements that were intended as binding, despite a need for further documentation or further negotiation. It is, of course, the aim of contract law to gratify, not to defeat, expectations that arise out of intended contractual agreement, despite informality or the need for further proceedings between the parties." (Footnotes omitted.) *Thachers Ins. Annuity Ass'n* v. *Tribune Ca*, 670 F. Supp. 491, 497-498 (S.D.N.Y. 1987).

of neutral third party to determine lease price under formula); *Cataldo* v. *Zuckerman*, 20 Mass. App. Ct. 731, 737 (1985) (accepting formula for determination of compensation as sufficiently specific to create contract).

The Tripartite Agreement provided a pricing formula to determine the price to be paid for the Hayward Parcel. When the parties signed the Tripartite Agreement, most of the information needed to complete that formula was available. Because the formula incorporated the fair market value of the parcel at the time of the future transaction, which, by definition, was unknown at the time of contracting, Section 13.01 detailed an appraisal procedure to be used for securing that information. By using that procedure, which called for the creation of a three-member appraisal board, the parties could have determined the price to be paid. In addition, the Second Supplemental Agreement states that "if the Developer shall exercise the right and option set forth in Section 6.02, there shall automatically be created an agreement by the Developer to buy and the City to sell" the Hayward Parcel. Moreover, it specified that "appropriate details of the purchase and sale . . . shall be resolved by arbitration" in accordance with a specified procedure. Although this provision was not added until 1982, it created a means for resolving disputes that might arise in the course of effecting the ultimate sale of the Hayward Parcel. In particular, questions about the exact size of the parcel and the allocation of air rights over the relevant public streets were the kind of "details" that could be worked out using this process.[19] To

[19] There is little doubt that all parties understood the general boundaries of the Hayward Parcel, given that the parcel is bounded by streets and buildings in a small city block. Although the exact details of the boundaries of the parcel might have varied depending upon what building plan was ultimately approved by the city and the BRA, this was not a situation in which the parties agreed upon the purchase of a

borrow Justice Holmes's metaphor, the machinery was built and had merely to be set in motion. See *Drummond* V. *Crane*, 159 Mass. 577, 579 (1893) (a future writing was merely "additional wheel in the machinery" of a contract). See also *Sands* v. *Arruda*, 359 Mass. 591, 594 (1971); *Coan* v. *Holbrook*, 327 Mass. 221, 224 (1951). We therefore conclude that the Tripartite Agreement, as amended, was an enforceable contract, under which both parties had certain rights and obligations.

B

Because the Tripartite Agreement, as amended, was an enforceable contract, upon LPA's exercise of its option in 1986, there arose a bilateral contract for the purchase and sale of the Hayward Parcel. See *American Oil Co.* v. *Cherubini*, 351 Mass. 581, 585 (1967) (exercise of option creates bilateral contract for purchase and sale); *C. & W Dyeing & Cleaning Co.* v. *DeQuattro*, 344 Mass. 739, 741 (1962) (same). See also *Blum* v. *Kenyon*, 29 Mass. App. Ct. 417, 420 (1990) (same). The question then becomes whether LPA can, as a matter of law, maintain a claim against the city for breach of that contract. "The general rule is that when performance under a contract is concurrent one party cannot put the other in default unless he is ready, able, and willing to perform and has manifested this by some offer of performance." *Leigh* v. *Rule*, 331 Mass. 664, 668 (1954). See 6 Corbin, Contracts § 1258 (1962). Any material failure by a plaintiff to put a defendant in breach bars recovery, see *Kanavos* v. *Hancock Bank & Trust Co.*, 395

totally unspecified or undemarcated property Compare *Lucey v. Hero Int'l Corp.*, 361 Mass. 569, 573 (1972).

Mass. 199, 202-203 (1985); *Pas-Teur, Inc.* v. *Energy Sciences, Inc.*, 11 Mass. App. Ct. 967, 968-969 (1981) (citing cases), unless the plaintiff is excused from tender because the other party has shown that he cannot or will not perform. *Leigh* v. *Rule, supra.* Even if a potential buyer notifies the seller of the buyer's intention to tender on a certain date and appears at the registry of deeds on that date with the required consideration, there may not be the "readiness to perform" that is a necessary condition of placing the defendant in breach. See *Mayer* v. *Boston Metro. Airport Inc.*, 355 Mass. 344, 350-352, 354-355 (1969).

Applying these principles to the facts most favorable to LPA in this case, the question becomes whether LPA, as a matter of law, was ready, able, and willing to close the sale of the Hayward Parcel prior to January 1, 1989, and whether LPA indicated as much to the city.[20] There is no evidence in the record, and LPA does not now argue, that LPA attempted to tender payment for the Hayward Parcel between July, 1986, when it exercised its option under the Tripartite Agreement, and March, 1988, when it transferred its rights to

---

[20] The city's motion for directed verdict argued that there was no evidence to support a finding that "the plaintiff called for a closing to acquire title" to the Hayward Parcel, and that if there was a demand for closing it was insufficient. The city incorporated these defenses in its motion for judgment notwithstanding the verdict. It also argued that there was no evidence "of either the plaintiff or the city taking any steps to negotiate or enter into a purchase and sale agreement" during the option period. Moreover, the issue of LPA's failure to demand recourse to the specified arbitration procedure was raised repeatedly over the course of the litigation, including in the city's motion for special verdict, motion for directed verdict, by incorporation into its motion for judgment notwithstanding the verdict, and in the city's brief to this court. The city argued in its motion for judgment notwithstanding the verdict that LPA failed to activate the Section 13.01 appraisal procedure, and thus that the city could not be in breach.

Campeau. LPA must therefore rely on the possibility that Campeau fulfilled LPA's contractual obligations by tendering payment or demanding the deed. On December 19, 1988, less than two weeks prior to the drop dead date, Campeau informed Mayor Flynn by letter that "we have no recourse but to officially notify the city that we wish to complete the transaction and make payment immediately." This is the best evidence in the record of an attempt to tender payment to force the city to close the sale of the Hayward Parcel.[21] It is not sufficient. To place a seller in default, a buyer must manifest that he is ready, able, and willing to perform by setting a time and place for passing papers or making some other concrete offer of performance. See *Leigh* v. *Rule, supra* at 668; *LeBlanc* v. *Molloy,* 335 Mass. 636, 637-638 (1957); *Mayer* v. *Boston Metro. Airport, Inc., supra* at 354. Even attributing to LPA Campeau's action in sending the letter to Mayor Flynn (an attribution the city urges us not to make), Campeau's letter does not specify when, where, or how Campeau intends to tender payment, nor does it indicate what Campeau believes the city's obligations were at that point in time.[22] Compare *Fox of Boylston St. Ltd. Partnership* v. *Mayor of Boston,* 418 Mass. 816, 819-820 (1994) (notice letter specified closing date and location); *Bucciero* v. *Drinkwater,* 13 Mass. App. Ct. 551, 552-553 (1982) (buyer was ready, willing, and able to perform when he arrived at closing with payment). Campeau provided no suggested purchase price, nor even a

---

[21] Prior to December, 1988, Campeau sent several letters to the BRA asking for an extension of the option period. In none of these letters, however, did Campeau demand tender of the deed to the Hayward Parcel or offer to tender payment.

[22] It was also unhelpful of Campeau to send this "tender" to Mayor Flynn, given that officials from both Campeau and LPA testified that they knew that the BRA, and not Mayor Flynn's office, had primary responsibility for the transaction.

suggestion as to when Campeau and the city should meet to resolve the remaining differences. Finally, this single sentence is embedded in a long letter to the mayor sent only weeks prior to the termination of the option period. It was an empty gesture that could not possibly have been acted on in the time remaining until LPA and Campeau forfeited their rights under the Tripartite Agreement.

LPA might claim that neither it nor Campeau could have tendered and thus put the city in breach, because absent a final delineation of what the parcel contained and an appraisal of what the parcel was worth there was no basis for a definitive tender. But the agreement between the parties specified mechanisms for resolving just these open questions. Indeed it is only because such mechanisms were specified that we have been willing to hold that the arrangement between the parties is definite enough to constitute a binding agreement.

Under the Section 6.02 price formula, the parties could not have completed the transaction without using the procedure set forth in Section 13.01 to determine whether any increase in the fair market value of the parcel since 1978 was attributable to the construction of Phase I. The Tripartite Agreement does not specify which party has the obligation to trigger Section 13.01's appraisal process; both parties share this responsibility. *Neither* party could be ready, able, and willing to close the sale until this procedure was at least initiated. Given that this information had not been obtained, and that neither LPA nor Campeau ever sought to obtain it, LPA cannot, as a matter of law, have put the city in default. See *Kanavos* v. *Hancock Bank & Trust, supra* at 203 ("[i]f neither could perform, even if the [defendant] repudiated the contract, neither could recover").

Similarly, under the arbitration clause of the Second Supplemental Amendment, LPA, the city, and the BRA

shared responsibility for using arbitration to resolve the remaining differences that LPA claims prevented it from closing the transaction.[23] Neither LPA nor the city activated those procedures. LPA's complaint that the city and the BRA breached the contract by failing to determine the exact size and composition of the Hayward Parcel is undermined by LPA's failure to initiate arbitration about the undecided details or even to propose to the city that the procedures specified in the Tripartite Agreement should be used to resolve these differences. Similarly, questions about the treatment of Avenue de Lafayette and the allocation and value of air rights over it and other streets could have been answered in arbitration, but neither LPA nor Campeau ever sought such answers.

LPA's claims must thus rest on the possibility that even if its tender — particularly the December 19, 1988, letter from Campeau to Mayor Flynn — was insufficient, LPA (and Campeau) should be excused from its obligation to tender because the city's tactics and delays demonstrated that it would not perform under the contract. See *Leigh* v. *Rule*, *supra* at 668 ("the law does not require a party to tender performance if the other party has shown that he cannot or will not perform"). LPA claims, and the trial judge in denying the city's motion for directed verdict or judgment notwithstanding the verdict cites the fact, that the city failed to secure needed appraisals with which to determine the price for the Hayward Parcel,[24] that the BRA had proposed

---

[23] LPA only brought suit in 1992, long after such recourse to arbitration to fix obligations would have been pointless, and so the city is entitled simply to claim that it had never been put in breach.

[24] In the Tripartite Agreement, the city was obligated to obtain appraisals of the 1978 value of parcels D-3 and D-4. Although it secured an appraisal for parcel D-3, it did not for D-4. The city argues, however,

zoning regulations that placed unacceptable height restrictions on the parcel, that the city's transportation department was threatening to route a street through the parcel, and that LPA, Campeau, the city, and the BRA had failed to reach agreement as to how to treat the Avenue de Lafayette. These facts, taken alone or together, do not excuse the obligation to tender. There was testimony from Marco Ottieri, LPA's project manager, that throughout the mid-1980's, LPA was committed to purchasing the Hayward Parcel regardless of its ultimate configuration and of restrictions placed upon the parcel by the city, because it would "build whatever we could build there profitably." He stated that LPA would have bought the parcel regardless of height restrictions and whether or not the city kept open Avenue de Lafayette. This seriously weakens LPA's argument that the city's proposed regulation of the Hayward Parcel materially affected the transaction or amounted to a repudiation.

Unlike a situation in which a defendant clearly expresses an unwillingness to perform, thereby repudiating the contract,[25] here LPA seeks to attribute repudiation to the city based on the mere fact that uncertainties remained that LPA shared responsibility for resolving. Compare *Hastings Assocs.* v. *Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 177 (1997) (where defendant indicated that it would not fulfil its obligations, defendant was in default and plaintiff was not obliged to use specified procedures to determine value of

---

that the appraisals for D1, D-2, and D-3 sufficed to determine the value of D-4, which was a very small part of the over-all parcel.

[25] Compare *Kanavos* V. *Hancock Bank & Trust Co.*, 395 Mass. 199, 201-202 (1985) (bank repudiated Option contract to sell shares of stock by selling shares to a third party); *Limpus* v. *Armstrong*, 3 Mass. App. Ct. 19, 22 (1975) (defendants repudiated purchase and sale contract by selling property to third party).

business). In this circumstance, where a complex contract leaves certain key terms to be decided by formulae and procedures, and where both parties share responsibility for activating those procedures, the plaintiff cannot be ready, able, and willing to tender, nor can the plaintiff put the defendant in default, unless the plaintiff attempts to use the contractually specified mechanisms to overcome the very uncertainties they were designed for. If two parties form an agreement that incorporates procedural devices to overcome unknowns, a plaintiff must at least attempt to make use of those devices before he can claim that the unknowns prevented meeting his obligations at law. This is particularly true in a complex and heavily regulated transaction such as this one, where public entities and public and elected officials with changing policies and constituencies are involved, and the transaction spans many years. This is not to say that governments are absolved from performing contractual obligations, but where a government contract specifies procedures and methods a private party must be particularly assiduous to comply with them. "Men must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R.* v. *United States,* 254 U.S. 141, 143 (1920) (Holmes, J.). LPA knew at the time it entered into the contract with the city that political bodies have various obligations and constraints, and that closing the sale after exercising its option would require agreeing on the transaction's specifics. We therefore conclude as a matter of law that LPA was not excused from its obligation to put the city in default, and that LPA did not fulfil this obligation.

C

LPA alleges not only that the city breached the Tripartite Agreement but that it did so in bad faith. This allegation of

bad faith does not change our analysis in the preceding subsection.

The last clause of the Third Supplemental Agreement states that the January 1, 1989, drop dead date shall not apply if "the City and/or the [BRA] shall fail to work in good faith with the Developer through the design review process to conclude a closing." The Third Supplemental Agreement, however, was not signed until October 29, 1987, immediately prior to LPA's transfer of its rights to Campeau.[26] There is overwhelming evidence that the review process progressed appropriately as soon as Campeau initiated the process in the spring of 1988,[27] only months prior to the drop dead date.[28]

---

[26] Campeau's actions in this regard must be attributed to LPA, for if they are not then the city's alternate argument that LPA abandoned the contract when it transferred its rights to Campeau would take on considerable force. LPA can- not have it both ways.

[27] Although LPA complains that the BRA's handling of the design review process prior to October, 1987, when the Third Supplemental Agreement was signed, violated the implied covenant of good faith, we reject this claim on two grounds. First, when the parties amended their agreement in 1987 and included a good faith clause, the slate was wiped clean for these purposes. Second, LPA failed to show that any delay in the design review process prior to 1988 was attributable to bad faith on the part of the city or the BRA rather than a lack of preparedness or persistence on LPA's part. LPA was engaged in discussions and negotiations with the BRA during 1984, 1985, and 1986, and may have completed the first phase of the BRA's four-stage authorization process by submitting an initial sketch of its plans for the Hayward Parcel, but LPA concedes that it did not progress beyond that very preliminary point. LPA did not press forward with its design, and it therefore cannot complain that its design was never approved.

[28] On April 25, 1988, Campeau's senior vice-president, Lenard McQuarrie, sent the BRA's director a letter indicating that Campeau had "begun to marshal" resources for the project and was about to "initiate" the review process. On May 16, 1988, McQuarrie stated that Campeau

Campeau's letters to the BRA during 1988 consistently demonstrate that the design review process was proceeding smoothly and in a collaborative fashion.[29] Thus, LPA cannot argue that the BRA or the city acted in bad faith with regard to the design review process during this period.[30]

Had bad faith infected the design review process itself, the drop dead date would have been extended automatically according to the terms of the Third Supplemental Agreement. As the review process was not so infected, LPA' S bad faith claim rests on the fact that the BRA refused to extend the drop dead date despite Campeau' s repeated requests for such an extension. A duty of good faith and fair dealing is implicit in the performance of a party's contractual obligations, see *Fortune* v. *National Cash Register Co.*, 373 Mass. 96, 102-103 (1977), and generally if parties modify an existing contract, their modification must be made in good faith: one

---

was "beginning to commit significant funds to preliminary design . . . for the Hayward Place site."

[29] A June 17, 1988, letter from McQuarrie to the BRA stated that "(b]ased on the cooperation we are receiving from both yourself and your staff, we are optimistic that the project will proceed quickly through the. . . Development Review process. Similarly, an October 21, 1988, letter stated that "[w]e are making excellent progress on the . . . master planning of Boston Crossing and have begun the . . . review process." And on December 19, 1988, Campeau's letter to Mayor Flynn stated that all parties were "making good progress towards the final approval of this project."

[30] Moreover, even if the city *did* act in bad faith in the design review process and thus the option period was extended beyond January 1, 1989, neither Campeau nor LPA ever attempted to enforce the agreement by seeking arbitration, tendering payment, or seeking a closing after that date. As noted above, Campeau received design authorization in June, 1989, but went bankrupt in 1990. LPA did not then renew its negotiations with the city, but instead filed suit against Campeau in July, 1990, and against the city and the BRA in March, 1992.

party cannot extract the modification from the other wrongfully. See U.C.C. § 2-209, comment 2 (1989). But LPA cites no authority for the proposition that the refusal by one party to accede to a modification that would inure to the benefit of the other party is, in itself, bad faith, where the only ill motive alleged is a desire to avoid the benefit in question. Absent bad faith in the design review process, the city and the BRA were under no contractual obligation to grant an extension to LPA. Even if the defendants' refusal to extend the deadline was motivated by the possibility of evading the pricing formula in the Tripartite Agreement, as LPA suggests,[31] that refusal could not constitute bad faith, because the BRA had no contractual duty to grant the extension that LPA sought. Compare *Anthony's Pier Four, Inc.* v. *HBC Assocs.*, 411 Mass. 451, 472 (1991) (finding of bad faith justified where contract required defendant to approve a development plan and defendant refused to do so in order to extract monetary concessions from plaintiff). See Restatement of Contracts § 205 comment a (1979).

Finally, the mere fact that the city did not convey the Hayward Parcel to Campeau prior to January 1, 1989, does not support a claim of bad faith. Particularly given the uncertainties that LPA added to the transaction — including

---

[31] LPA presented evidence that during the period in which LPA sought authorization of the sale to Campeau, the city's real property board publicly expressed concern that the pricing formula in the Tripartite Agreement was unfavorable to the city. On December 30, 1987, Commissioner J. Edward Roche of the city's real property department wrote Mayor Flynn expressing concern that a transfer of rights from LPA to Campeau might bring about a "windfall" to Campeau because of the pricing formula in Section 6.02. LPA also showed that the minutes of a meeting of the real property board on January 22, 1988, stated that "the Board expressed its desire . . . to receive the fair market value for the Hayward Parcel (abandoning the Tripartite formula)."

the substitution of Campeau for LPA and Campeau's including in its design proposals submitted for review designs for a much larger project, the Boston Crossing project, than LPA's original project that referred only to the Hayward Parcel — LPA cannot maintain that the city acted in bad faith by not completing the transaction, unless LPA and Campeau had also done all they could to force the city to close the sale. Had LPA, or Campeau, been serious about putting the city in default, it could either have indicated more clearly that it was ready, able, and willing to close the sale by indicating its understanding of the exact composition of and price to be paid for the Hayward Parcel and setting a time and place for a transfer of the deed, thereby forcing the city to make use of the appraisal and arbitration procedures, or itself pressed the appraisal and arbitration procedures specified in the Tripartite Agreement to resolve all remaining disagreements. That it did none of these things bars its claim against the city.[32] Neither party tendered performance, and neither was in breach or default. See *Flynn* v. *Wallace,* 359 Mass. 711, 716 (1971); *Hapgood V. Shaw,* 105 Mass. 276, 279 (1870). See also Corbin, Contracts § 663 (1960); § 1258 (1962).

III

We turn now to LPA's claims against the BRA. The Superior Court jury found that the BRA tortiously and intentionally interfered with LPA's contractual relations with

---

[32] The jury returned a special verdict that affirmed that "L.P.A. perform[ed] its obligations under the contract." This verdict was incorrect as a matter of law, given the fact that LPA fulfilled none of the obligations set out above.

Campeau. The judge granted the BRA's motion for judgment notwithstanding the jury's verdict. The judge ruled that the Massachusetts Tort Claims Act (Act), G. L. c. 258, § 10 *(c)*, renders the BRA, as a "public employer," immune from suit for "any claim arising out of an intentional tort, including . . . interference with contractual relations." LPA argues that the BRA was not entitled to this ruling because it had raised the bar of the statute in an untimely fashion; because the BRA was an "independent body politic and corporate" and as such explicitly excluded by G. L. c. 258, § I, from the immunity accorded by § 10 *(c)*; and because, even if § 10 (c) did apply to the BRA, this would only remit the BRA to its situation before the enactment of c. 258, at which time the BRA was amenable to suit for intentional torts.

A

Although the BRA did not raise the bar of the statute in a motion to dismiss or at summary judgment, it did do so in its motion for a directed verdict at the close of all the evidence. The BRA renewed this argument in a motion for judgment notwithstanding the verdict. The judge ruled that this was sufficient, and that there had been a "flurry of arguments from both sides" on the issue. The only relevant authorities LPA cites for the proposition that the BRA raised this issue too late have to do with refusals to grant leave to amend pleadings because of prejudice to the nonmoving party. See *Mathis* v. *Massachusetts Elec. Co.*, 409 Mass. 256, 264 (1991); *Hamed* v. *Fadili*, 408 Mass. 100, 105 (1990). These authorities recognize that this sort of matter is committed to the discretion of the judge. Assuming that this should be treated as a motion to amend the pleadings, we conclude that the judge did not abuse his discretion. This is particularly so

because the status of the BRA for purposes of § 10 *(c)* is a purely legal question not requiring recourse to the jury.

B

In *Whitney* v. *Worcester,* 373 Mass. 208, 212 (1977), and *Mo- rash & Sons* V. *Commonwealth,* 363 Mass. 612 (1973), we warned that, if the Legislature did not act to abrogate the immunity from liability in tort accorded at common law to governmental entities, this court would do so. The Massachusetts Tort Claims Act followed in 1978, providing a scheme of tort liability for "public employers" in certain circumstances and subject to several conditions. See generally Glannon, Governmental Tort Liability under the Massachusetts Tort Claims Act of 1978, 66 Mass. L. Rev. 7, 10 (1981). Section 10 *(c)* excludes liability for intentional torts from the scope of c. 258 and specifically mentions the tort of interference with contractual relations. See G. L. c. 258, § 10 *(c).* Section 1 defines a public employer as

> "the commonwealth and any county, city, town, educational collaborative, or district, including any public health district or joint district or regional health district or regional health board established pursuant to the provisions of section twenty-seven A or twenty-seven B of chapter one hundred and eleven, and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof. . . which exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority, the Massachusetts Turnpike Authority, or any other independent body

> politic and corporate. With respect to public employees of a school committee of a city or town, the public employer for the purposes of this chapter shall be deemed to be said respective city or town.

The Superior Court judge ruled that the BRA was not an "independent body politic and corporate." Neither the statute itself nor our prior decisions allow a ready answer to the controversy the parties raise about this classification. Certainly the term is not self-defining. The leading case on? this matter, the learned opinion of the Appeals Court in *Kargman* v. *Boston Water & Sewer Comm'n*, 18 Mass. App. Ct. 51(1984), see *Commesso* v. *Hingham Hous. Auth.*, 399 Mass. 805, 808 (1987), traces the history of the term "body corporate and politic" from its original appearance in the Preamble to our Constitution to its present usage to designate "a legal entity [created by the Legislature] to perform specified tasks deemed to be essential public functions." *Kargman, supra* at 55. It is only the subset of *independent* bodies corporate and politic that do not enjoy immunity from intentional torts under § 10 *(c)*. What entities, in addition to the three specifically mentioned in § 1, are to be identified as independent bodies corporate and politic we have been left to discern from a rather inadequate set of hints. The term itself is not very helpful, so that the Appeals Court in *Kargman* sought to extrapolate from the list of authorities specifically designated as independent in § 1 to instances not specifically named. It identified two general features of the designated entities: financial independence and political independence. The court went on to identify certain indicia of financial and political independence, *id.* at 56-58, and concluded that the Boston water and sewer commission was such an independent body. By defining the term independence in terms of financial and political

independence, the *Kargman* analysis at least has the virtue of disaggregating the term into two possibly more manageable units, but the norm is still defined by reference to itself, and that is a problem.

The Superior Court judge, in a thorough and closely reasoned memorandum, applied the *Kargman* analysis to the situation of the BRA. He reached his conclusion that the BRA is not an independent body politic by emphasizing the factors that detract from the BRA's political independence: when initiating urban renewal projects it is subject to stringent public notice requirements and requires approval for many of its actions at the State and local level. He also found lacking indicia of financial independence, in that the BRA must account for its expenditures at the State and the local level and may receive State financial assistance for its urban renewal projects and advances to cover certain of its expenses. He concluded that "the BRA is subject to many checks on its power to initiate and carry out redevelopment projects in Boston, which do not comport with political and financial independence. It is significantly less autonomous than either the MBTA, Turnpike, or Massport." LPA points out the many ways in which the BRA has financial and political independence similar to that of the three authorities named in § 1: removal of authority members only for cause; its ability to sue and be sued in its own name; its ability to hold title to property in its own name; its enjoyment of the power of eminent domain; its ability to incur indebtedness and issue bonds without pledging the credit of the State or city; and its ability to charge market rents for its properties. LPA also compares the BRA to the Boston water and sewer commission, which was held to be independent in *Kargman*. Moreover, LPA points out that some of the features urged by the BRA as indicia of a lack of independence, such as the oversight by the State auditor of its expenditures which the judge mentions, apply to the three named authorities as well.

This battle of factors seems much closer to a standoff than either the BRA's or the judge's analysis would acknowledge.

Any analysis that relies heavily on the *Kargman* factors must cope with the embarrassment that just the factors that are discerned in *Kargman* as the indicia of independence of the three named entities are present with at least as much force in the case of Boston, other cities and towns, and the Commonwealth itself — all of which are designated at the beginning of § 1 as public employers. The BRA suggests that perhaps recourse to a possible underlying rationale for the designation of the three named entities might assist analysis: they all provide services for a fee not to the general public but to that specific segment of the public that chooses to use those services, and so it is fair that the users bear the cost in higher fees of the injuries intentionally inflicted by the authorities. This is only mildly convincing. We do not see why the costs of injuries inflicted by non-independent bodies should be borne by the injured parties alone and not by the public in general.[33]

Though we do not decline the illumination that these proposals and analyses might offer, we probably cannot do much better in this case than to rely on analogy, that logically imperfect but inveterate tool of the law in tight corners. See generally Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harv. L. Rev. 925 (1996); Levi, An Introduction to Legal Reasoning (1949). And here the closest analogy to the BRA are the local housing authorities, to which in *Commesso* we declined to as- sign independent status for the purposes of §§ 1 and 10 *(c)*. See *Commesso, supra* at 809. As the Superior Court judge noted, it is significant that

---

[33] In *Kargman* v. *Boston Water & Sewer Comm'n*, 18 Mass. App. Ct. 51, 56 n.5 (1984), the Appeals Court cast doubt on this criterion.

redevelopment authorities were created by the Legislature to assume the powers, such as land assembly and the carrying out of redevelopment projects, formerly held by housing authorities. See St. 1952, c. 617, § 4, amending G. L. c. 121, § 26QQ. In communities that choose not to establish redevelopment authorities, the powers assigned to redevelopment authorities remain with the housing authorities. See G. L. c. 121B, § 9. If a community chooses to establish a redevelopment authority, the governance of that authority is the same as that which applies to a housing authority, G. L. c. 121B, §§ 5-7. And, as the Superior Court judge pointed out,

> "As operating agencies, housing and redevelopment authorities enjoy the same powers, including but not limited to the power to: sue and be sued; work with the federal government on urban renewal projects; receive public or private loans and grants; take property by eminent domain; clear and improve property; enter into contracts necessary to carry out housing and urban renewal projects; make relocation payments to displaced businesses or persons; borrow money upon the security of their bonds or notes; invest in securities; contract with organizations undertaking c. 121A projects; make and amend rules and regulations; and join with other operating agencies in exercising their respective powers. G. L. c. 121B, § 11."

Indeed, the two-page chart provided by LPA as an appendix to its brief here comparing the political and financial situation of various types of entities in the Commonwealth shows only

one nontrivial difference[34] between the BRA and a housing authority: the existence of statutory limits on the rent that housing authorities may charge tenants, see 0. L. c. 121 B, § 32, and the absence of such constraints on sales and leases of property by a redevelopment authority under G. L. c. 121B, § 49. But of course this difference is merely the result of the assignment of functions to a redevelopment authority in communities that choose to establish one. If redevelopment functions remain in the housing authority, which then plays a dual role pursuant to G. L. c. 121B, § 9 *(b)* or *(c)*, then the housing authority too, in respect to those functions, may charge market rents.[35] And it would be captious to suggest that a housing authority does or does not enjoy the immunities of the Act depending on whether redevelopment functions have been left with it.

The BRA is unique among redevelopment authorities and enjoys a special statutory basis. See generally Aronson, The Boston Redevelopment Authority: A Quasi Public Authority, 43 B.U. L. Rev. 466 (1963). The most significant difference between the BRA and other redevelopment authorities is that the BRA functions as the city's planning board and enjoys the powers of the State housing board in respect to c. 121A urban renewal projects.[36] See St. 1960, c. 652. See also *Opinion of the*

---

[34] LPA also notes that the BRA does not need planning board approval for projects, whereas a housing authority does. This is because the BRA has had transferred to it the functions of the city's planning board in respect to its projects.

[35] General Laws c. 121B, § 9, states that housing authorities with redevelopment authority have the powers granted regular redevelopment authorities under (1. L. 121B, § 49.

[36] General Laws c. 121A, § 4, permits the housing board to make rules and regulations regarding the approval of redevelopment projects. The housing board must approve most redevelopment projects, G. L. c. 121 A, § 5, and must inspect the construction of redevelopment

Justices, 341 Mass. 760, 787-788 (1960). But both a city planning board and the State housing board would certainly be within the § 1 definition of public employers for the purposes of G. L. c. 258, § 10, and the addition of their powers should not make the designation of the BRA as a public employer less apt.

Finally, we resolve whatever indeterminacy this analysis may leave in favor of subjecting the BRA to the general regime of c. 258. The BRA is certainly a public body, a governmental entity of some sort performing public functions. Any doubts about the BRA's status under the difficult and uncertain designation of "independent body politic and corporate" should be resolved against such a designation, because of the desirability of making the c. 258 regime as comprehensive as possible, thus avoiding reintroducing the "crazy quilt" of immunities, *Rogers* v. *Metropolitan Dist. Comm'n*, 18 Mass. App. Ct. 337, 338-339 (1984), which the Act was meant to replace. This is particularly so because any decision taking a governmental entity out of the category of "public employers" has the effect not only, as here, of making that entity liable for intentional torts, but also of removing the immunities provided by the other provisions of § 10. This may have large consequences to which none of our cases so far has attended. Of particular concern is removing a governmental body from the protection of the immunity of § 10 *(b)*, which refers to

> "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office

---

projects to ensure that construction complies with the approved proposal. G. L. c. 121A, § 8.

> or employment, whether or not the discretion involved is abused."

We conclude that the BRA is a public employer not excluded from the scope of the Act,

C

We have less difficulty disposing of LPA's ingenious argument that, even if the BRA is not an independent body politic and corporate, § 10 *(c)* does not confer upon it immunity from liability for intentional torts. Section 10 of c. 258 provides that "[t]he provisions of sections one to eight, inclusive, shall not apply to" any of the claims listed in that section. G. L. c. 258, § 10. The list includes, among other things, claims based "on the exercise or performance or the failure to exercise or perform a discretionary function," § 10 *(b);* and claims arising out of intentional torts, § 10 *(c).* Other excluded claims relate to assessment or collection of taxes, § 10 (d); issuance, denial or revocation of permits or licenses, § 10 *(e);* inadequate or negligent inspections, § 10 (1); failure to provide fire protection or police services, § 10 *(g)-(h);* and negligent provision of medical services, § 10 (1) (2). Section 2 provides for liability of public employers for negligence, G. L. c. 258, § 2, and §§ 4-7, impose certain prerequisites for claims against public employers, including the prior presentation of such claims for administrative action, and provide for procedures for their resolution. G. L. c. 258, §§ 4-7. LPA argues that because § 10 provides that none of these provisions shall apply to intentional torts, the result is that such claims are simply remitted to the preexisting law governing liability. And because the BRA's enabling statute, G. L. c. 121B, § 13, which preexisted C. 258, provided that the BRA shall be "liable . . . in tort in the same manner as a

private corporation," the BRA continues to be liable for the intentional tort charged here. LPA finds confirmation for this conclusion in our decision in *Spring* v. *Geriatric Auth. of Holyoke,* 394 Mass. 274 (1985), in which we stated that "[b]y excluding intentional torts from the scope of G. L. c. 258, the Legislature left open the matter of governmental liability for intentional torts. Consistent with the common law principles of governmental immunity which preceded the Massachusetts Tort Claims Act, we conclude that public employers retain their immunity from suits arising from intentional torts." *Id.* at 284-285. Because the preexisting law, to which we are remitted according to LPA's argument, allowed for BRA's liability for intentional torts, the BRA does not enjoy immunity for intentional torts now.

LPA's reading of the statute is not in accord with its over-all purpose of enacting a comprehensive and uniform regime of tort liability for public employers in the wake of our decisions in *Whitney* v. *Worcester,* 373 Mass. 208, 212 (1977), and *Mo- rash & Sons* v. *Commonwealth,* 363 Mass. 612 (1973). Although we have not undertaken a review of such legislation, it is likely that the enabling statutes of many public bodies contain a variety of provisions relating to the tort liability of those bodies. It would be the upshot of LPA's argument that, whenever any of the provisions of § 10 (including, for instance, those excluding liability for discretionary functions or for failure to grant or renew a license or permit) applied, we would be remitted to the preexisting law. It is sufficient to mention that the preexisting law to which LPA refers, G. L. c. 121B, § 13, applies to the Boston Housing Authority (BHA) as well, so that the BHA on this argument would be liable for the whole range of claims

excluded by § 10.[37] Compare *Commesso* v. *Hingham Hous. Auth., supra* at 809. Such a reading would be so manifestly against the intention of the Legislature to introduce a uniform regime of tort liability for public bodies, see *Rogers* v. *Metropolitan Dist. Comm'n, supra,* that a mere drafting infelicity will not lead us to adopt it. Similarly the statement quoted from our decision in *Spring* will not move us in that direction. In context it was quite irrelevant to the *Spring* case whether § 10 *(c)* was described as prescribing immunity for intentional torts or as remitting the matter to the preexisting common law, which in that instance would have foreclosed tort liability altogether. See *Spring, supra* at 295 (Abrams, J., concurring) (Federal Tort Claims Act, 28 U.S.C. § 2680[h] [1982], on which c. 258 is patterned, provides an interpretive guide and has been construed "as immunizing public employers from suits arising out of intentional torts"). We therefore hold that the BRA is immune under G. L. c. 258, § 10 *(c)*, from suit for intentional torts.

IV

LPA also claims that the motion judge erred in entering summary judgment against LPA on its G. L. c. 93A claims against the city and the BRA. Chapter 93A proscribes "unfair or deceptive practices in the conduct of any trade or commerce." G. L. c. 93A, § 2 *(a)*. A party engages in trade or

---

[37] LPA seeks support for its argument in a 1983 amendment of G. L. c. 121B, § 13, that altered the treatment of the liability of employees of redevelopment and housing authorities. This is unpersuasive. The Legislature did not address itself directly to the operative first sentence of § 13, and we will not assume that an amendment of an independent portion of the section endorsed or reaffirmed that first sentence in the face of the strong Legislative mandate of c. 258.

commerce when it acts in a "business context." "This court . . . has repeatedly held that c. 93A does not apply to parties motivated by 'legislative mandate, not business or personal reasons.' " *Peabody N.E., Inc.* v. *Marshfield* 426 Mass. 436, 439-440 (1998), quoting *Poznik* v. *Medical Professional Ins. Ass'n*, 417 Mass. 48, 52 (1994). The gravamen of LPA's claim against the city and the BRA is that it was cheated out of the benefit that would have accrued to it if the agreement regarding the Hayward Parcel had been performed. This is indeed the kind of claim that is often made under c. 93A, see e.g., *Anthony's Pier Four; Inc.* v. *HBC Assocs.*, 411 Mass. 451, 475 (1991), but that does not mean that the city was engaged in trade or commerce when it entered into the arrangement nor when it took the actions of which LPA now complains. It is perfectly possible for a governmental entity to engage in dishonest or unscrupulous behavior as it pursues its legislatively mandated ends. The allowance of the motion of summary judgment was correct because the defendants' involvement in these transactions was wholly in pursuit of the legislatively prescribed mandate of G. L. c. 121A, § 2, that "the redevelopment of land not only in sub-standard areas but also in blighted open and decadent areas in accordance with a comprehensive plan to promote the sound growth of the community is necessary." There simply cannot be any doubt that the parties' dealings took place in the context of the pursuit of the urban renewal and redevelopment goals of c. 121A and c. 121B. That is the premise of every other part of this litigation. Although we have not yet addressed the question whether a public entity is ever a proper defendant

in a c. 93A action, it is quite clear that in this case at least these public entities are not.[38]

V

Because we conclude as a matter of law that the city did not breach its contract with LPA, we reverse the judgment of the Superior Court and order entry of judgment for the city. Whatever contractual claims LPA may have against the BRA must fail for the same reason. The judgment in favor of the BRA is affirmed because we agree that it is immune from suit for an intentional tort. The judgment in favor of the city and the BRA dismissing LPA's c. 93A is also affirmed.

So ordered.

---

[38] Cases such as *Boston v. Aetna Life Ins. Co.*, 399 Mass. 569, 575 (1987), in which the public entity may act as a plaintiff in a c. 93A action, are not apposite. One who deals with a public entity, as for instance in providing it with goods or services, may very well be engaged in trade or commerce without the entity being so engaged as well.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 92-1664-A

LAFAYETTE PLACE ASSOCIATES,
Plaintiff

v.

BOSTON REDEVELOPMENT AUTHORITY, et al.,
Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO AMEND JUDGMENT

The plaintiff, Lafayette Place Associates, "LPA", has moved this court to amend the judgment against the City of Boston by establishing Jan. 1, 1989 as the breach of contract date in order that prejudgment interest be computed as of that date pursuant to G.L. c. 231, §6C. For the foregoing reasons, the Motion is denied.

This civil action was tried before a jury which found that the City of Boston had entered into a valid contract with LPA, that LPA performed its obligations under the

contract, that the City of Boston breached the contract, and that LPA's damages as a result of the breach amounted to $9,600,000. The verdict was recorded on a special verdict slip containing nine questions. The jury verdict came after a protracted, vigorously contested trial involving complex issues, occasionally perplexing testimony and a mass of elaborate documentary evidence.

There was no request that the court instruct the jury to determine a breach of contract date or dates; there was no request for any instruction as to that facet of the case. The court neither instructed on the issue nor was the jury asked to find a date or dates of the breach of contract by a special question on the verdict slip. Nor was the jury asked by special question to designate the conduct or action of Boston which constituted the breach of contract.

The plaintiff did not object either to the lack of jury instructions on determining the date of any breach of contract, or to the lack of any question on the special verdict slip establishing a date of breach. After the jury

found a breach of contract and damages of $9,600,000, judgment entered with interest accruing from the date of commencement of the action, March 16, 1992. (The original judgment appeared to read: May 16, 1992; this has been corrected by an agreed motion such that it now reads: May 16, 1992).

Although the jury did not find any date of breach of the contract, the plaintiff's motion to amend judgment requests that the court set the date of the breach at January 1, 1989, which was the date for closing on the Hayward parcel according to the Tripartite Agreement as amended by the "Third Supplemental Agreement and Amendment".

DISCUSSION

Prejudgment interest in contract actions is determined by G.L. 231, §6C.

> In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages, at the contract rate, if established, or at the rate of twelve per cent per annum from the date of the breach or demand. If the date of the breach or demand is not

> established, interest shall be added by the clerk of the court, at such contractual rate, or at the rate of twelve percent per annum from the date of the commencement of the action . . ."

The absence of a finding as to the date of breach may have resulted from the plaintiff's tactical decision not to pursue that issue. Placing the additional burden on the jury to find a specific act by the City of Boston constituting the breach and/or a specific date on which the breach occurred, may have been sufficiently onerous so as to jeopardize a jury finding that a breach had been proven.

Regardless of the reasons for not having the jury establish the date of the breach, this court is not free to evaluate the evidence and make a finding as to that date. Fixing the date of the alleged breach is a question for the trier of fact and, after a trial by jury, the trial judge can not make that determination. Karen Construction Co. v. Lizotte, 396 Mass. 143, 149 (1985); Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass 118, 125 (1986). A trial judge sitting without jury may determine the date of

demand or breach. Cesco Mfg. Corp. v. Norcross, Inc., 7 Mass. App. Ct. 837, 845 (1979). See Sterilite Corp. v. Continental Casualty Co., 397 Mass. 837, 841-842 (1986) (after summary judgment declaring a breach of duty to defend, a judge may establish the breach date). There were no stipulations about the date of the breach. Compare Bushkin Associates, Inc. v. Raytheon Co., 906 F.2d. 11 (1st Cir. 1990).

In summary, where the plaintiff never requested and the jury was never asked to establish the date of the breach, and where there was no finding as to the date of the breach, this court can not and will not make that determination. And, where the date of the breach is not established, prejudgment interest is to be calculated from the date of the commencement of the action. Starr v. Fordham, 420 Mass. 178, 195 (1995).

ORDER

The plaintiff's motion to amend is DENIED. Interest on the judgment will run from March 16, 1992.

/s/ Robert A. Mulligan
Justice of the Superior Court

DATED: August 20, 1997

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 92-1664A

LAFAYETTE PLACE ASSOCIATES,
Plaintiff

vs.

BOSTON REDEVELOPMENT AUTHORITY and
CITY OF BOSTON,
Defendants

SPECIAL JURY VERDICT
PURSUANT TO MASS. R. CIV. P. 49(a)

1. Was there a valid contract between the City of Boston and L.P.A. for the purchase and sale of the Hayward parcel?

   YES _X_ NO ___

   If yes, answer Q #2, if no, proceed no further but announce that you have reached a verdict.

2. Did L.P.A. perform its obligations under the contract?

YES X **NO** ___

If yes, proceed to Q #4, if no, proceed to Q #3.

3. If L.P.A. did not perform its obligation under the contract was its failure to perform caused solely by a material breach by the City of Boston or solely because the City of Boston and the BRA were dealing with L.P.A. in bad faith during the process?

Breach by City **YES**_____ **NO**_____

Bad faith by B.R.A. **YES**_____ **NO**_____

Bad faith by City **YES**_____ **NO**_____

If yes to any part of Q #3 proceed to Q #4, if no, proceed no further but announce that you have reached a verdict.

4. Did the City of Boston breach the contract?

YES X **NO** ___

if yes or no, proceed to Q #5.

5. Was the B.R.A. acting as the agent of the City of Boston regarding the purchase and sale of the Hayward parcel?

YES ___ NO X

If yes, proceed to Q #6. If no, follow instructions under Q #6.

6. Did the B.R.A. breach the contract?

YES X NO ___

If you answered Q #6 yes or Q #4 yes (i.e. found a breach by the City or B.R.A.) answer Q #7, otherwise announce you have reached a verdict.

7. What damages were proximately caused to L.P.A. by the breach, less any money received for the Hayward parcel from Campeau.

Nine Million Six Hundred Thousand
(WORDS)

$9,600,000.00
(FIGURES)

If answered Q #7, proceed to Q #8.

8. Did the B.R.A. intentionally interfere with the contractual relations between L.P.A. and Campeau?

YES X NO ___

If yes, answer Q #9, if no, proceed no further.

9. What damages resulted to L.P.A. from that interference (less the money received from Campeau).

Six Million Four Hundred Thousand
(WORDS)

$6,400,000.00
(FIGURES)

I hereby certify that the verdict is agreed to by ten of the twelve jurors.

Claudia Juarez
FORELADY

DATED: , 1998

APPENDIX E

TO: Mayor Raymond L. Flynn

FROM: Commissioner J. Edward Roche

DATE: December 30, 1987

RE: Sale of Lafayette Place Project

Lafayette Place Associates/Mondev wishes to sell its development (the retail shops and garage but not the hotel) to Campeau Corporation of Toronto. In order to sell said development, Lafayette (and Campeau) must obtain the approval of the Boston Redevelopment Authority and the Real Property Board.

If, without negotiation, the BRA and City allow the sale or transfer to occur, the new owner, Campeau (and also the prior owner) would realize an immediate monetary windfall due to the 'Option Agreement' in this Tripartite Agreement and the existing favorable lease Mondev has with the city executed in 1980/81 by the White Administration.

The Option Agreement concerns the Hayward Place parcel (currently a leased open air parking lot), which is separated from the development by the Avenue De Lafayette (a public way which may very will be discontinued and sold with the Hayward Parcel possibly under the same formula). If this parcel were appraised at say $25 Million, Campeau, under the present formula would have to pay the City only approximately $13 Million.

The Garage Lease calls for a yearly rental fee to the City of Boston/Real Property Department of $344,000.00 However, due to a favorable formula in this lease, the City has not received anything to date. There is a provision for "Deferred Basic Rental", a mechanism purportedly by which all monies owed, but not paid in the particular year it accrued, would be paid to the City sometime in the future. The City is owed approximately $2 Million in Deferred Basic Rental.

Query: Does this sum of money fall through the 'cracks' if the Garage Lease is assigned?

The Real Property Department has not been involved in the active negotiations with Lafayette and Campeau. If this is currently happening, it is the BRA which is doing it. I have been kept apprised of the negotiations as they go along.

APPENDIX F

BOARD MEETING: Friday, 22 January 1988

A meeting of the Real Property Board was duly held in Room 801, Boston City Hall, on Friday, 22 January 1988.

The following members were present:

J. Edward Roche, Chairman
Jon A. Chilingerian
Donald A. Walsh

Also present:

Mr. Joseph P. Kelly, Real Property Department
Mr. James E. Robbins, Real Property Department
Attorney Steven A. Whitkin, Real Property Department
Mr. James D. Parsons, TAMS

The meeting was called to order by the Chairman J. Edward Roche at 9:15 a.m., and the minutes of the 20 November 1987 Board Meeting were approved.

The Board Members were introduced to Mr. James d. Parsons who will be the new Project Manager from TAMS for the Citywide Strategic Parking Study. They expressed their displeasure with the latest timeline submitted by TAMS for completion of the Final Draft, the public/private briefing sessions, the Symposium and the Final Report. The Board then directed Mr. James Robbins to meet with

TAMS and to work out a new Timeline for the Study. The Chairman also impressed on Mr. Parsons the Board's need for competent project management in light of the recent project management changes at TAMS. The Board distributed to Mr. Parsons, for his review, a copy of their November 20, 1987 Board Minutes which contains Board comments on the TAMS Study up to that time.

The Executive Secretary announced the following tabulations of bids filed at the Office of the Board for leasing the off-street parking facility at Purchase and High Streets and Atlantic Avenue, under the Fitzgerald Expressway, Boston for a term of two (2) years beginning January 1, 1988. Said proposals were publicly opened and read aloud at the Office of Board with Mr. Joseph Kelly and Attorney Steven Whitkin at 10:00 a.m., on Tuesday, December 15, 1987:

Mr. Steven Whitkin updated the Board on the possible transfer of the retail and garage components of the Lafayette Place Development from Mondev to Campeau (the company which acquired Allied Stores, including Jordan Marsh).

The three issues directly involving this department are the approximate $2 million in deferred basic rental which has accrued over the past six years, the formula in the Tripartite Option Agreement to compute payment for the Hayward Parcel and the yearly garage rental of a minimum of $344,000.00.

The Board expressed its desire to capture the $2 million owed the City (but deferred until now); to receive the fair market value for the Hayward Parcel (abandoning the Tripartite formula), and to receive the basic rental of $344,000.00 without contingency allowing for deferment of same.

Attorney Whitkin apprised the Board members that both the Mayor's Office of Development and the Boston Redevelopment Authority had been apprised of their concerns and that these three issues were among those that were 'on the table' in the negotiations between the BRA, Mondev and Campeau.

In response to an advertisement for a Parking and Transportation Consultant to undertake a study to determine the feasibility and transportation impact of developing and underground garage on and about the present site of the Kingston/Bedford Garage, the following five (5) firms submitted proposals submitted to the Real Property Department prior to the 5:00 p.m., November 17, 1987 filing date:

URS Corporation
80 Boylston Street
Boston, MA 02116

TAMS
38 Chauncy Street
Boston, MA 02111

Vanasse Hangen Brustin, Inc.
60 Birmingham Parkway
Boston, MA 02135

LEA Group
75 Kneeland Street
Boston, MA 02111

RICH AND ASSOCIATES - MICHIGAN

Barnes and Jarnis, Inc.
216 Tremont Street
Boston, MA 02116

A proposal evaluation process was designed to select the best parking and transportation consultant for this important project.

The proposal evaluation committee consisted of five (5) individuals. Said committee reviewed each firm's proposal and presented its findings to the Commissioner of the Real Property Department and the Real Property Board.

As a result of this process Rich And Associates, Inc. was the recommendation of the Committee. Attorney Whitkin also distributed a letter detailing the scope of services, time schedule, and fee. He also recommended that the Board rescind its vote of 22 May 1987 regarding this topic as being inappropriate. After discussion, on motion duly made and seconded, it was unanimously

VOTED: To rescind the Real Property Board Vote taken on 22 May 1987 regarding the hiring of a consultant to perform a feasibility study of the Kingston-Bedford

development site as follows:

> That the Chairman is authorized to enter into an appropriate agreement with the Boston Redevelopment Authority for the services of a consultant to perform a feasibility study for an underground parking structure at the Kingston-Bedford development parcel in an amount not to exceed $30,000. The BRA will provide $15,000 for the study from Kingston-Bedford garage disposition proceeds and the Real Property Board will select and manage the consultant's work.

It was also unanimously

VOTED: To authorize the Chairman to enter into a contract with Rich and Associates, Inc., 25240 Lahser Road, Southfield, Michigan, to provide parking and transportation consulting services to undertake a study to determine the feasibility and transportation impact of developing an underground parking garage on the Kingston-Bedford and Essex-Lincoln sites, in an amount not to exceed $60,000 to be paid out of the Parking Facilities Fund. The Boston Redevelopment Authority will partially reimburse the Board for the cost of this study in an amount not less than $15,000.

The Executive Secretary noted that Attorney Steven A. Whitkin's contract would expire February 23, 1988. Under terms of a new contract Attorney Whitkin would provide development consultant services for Lafayette Place Phase II and the Kingston-Bedford/Parcel 18 parcel to parcel linkage project in addition to being involved with disposition and/or construction of

parking facilities in the neighborhoods and downtown.

After discussion, on motion duly made and seconded, it was unanimously

VOTED: To approve a contract with Steven A. Whitkin, 778 Tremont Street, Boston, Ma 02118 as Development Consultant to the Real Property Board for one year beginning February 24, 1988, at a salary not to exceed Forty Eight Thousand One Hundred ($48,100) Dollars, said salary to be paid out of the Parking Facilities Fund; and to authorize the Chairman to execute a contract for the Board in accordance with the terms discussed above.

There being no further business, on motion duly made and seconded, it was unanimously

VOTED: To adjourn at 10:20 a.m.

ATTEST

A TRUE COPY

Richard M. Carter
Executive Secretary
Real Property Board

APPENDIX G

CAMPEAU

CORPORATION

320 Bay Street, Toronto, Ontario M5H 2P2 Telephone (416) 868-6460

December 19, 1988

Honorable Raymond Flynn
Mayor of the City of Boston
One City Hall Plaza
Boston, MA 02201

Dear Mayor Flynn:

Since our last meeting, the Presidential election has now taken place and although the result might have been a disappointment to you, I feel that the process of election of a president is so long that I am glad it is over. I feel that Mr. Dukakis put up a very good fight and certainly appeared sincere in his policies as to how he would discharge his responsibility as president.

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

CAMPEAU

CORPORATION

320 Bay Street, Toronto, Ontario M5H 2P2 Telephone (416) 868-6460

Our people have been seeking an extension to close on our purchase of land owned by the city, which is part of our downtown project. Mr. Coyle refused to extend the closing, but wanted to give some kind of letter which would, in fact, protect us on buying the land, but that change would expose us to perhaps paying a much higher price and could significantly affect our economics on the project.

My lawyers advised me today that we have no recourse but to officially notify the city that we wish to complete the transaction and make payment immediately.

I was somewhat surprised with that turn of event, because I was under the impression and I still am, that our people and your officials had been making good

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

CAMPEAU

CORPORATION

320 Bay Street, Toronto, Ontario M5H 2P2 Telephone (416) 868-6460

progress towards the final approval of this project. I know that you want this project, because it would clean up what is presently an eyesore and it would further your plans to continue to redevelop the combat zone. The fact that we have committed to put a Bloomingdale's on the piece of land that we are buying from the city certainly demonstrates our belief that this will be a very good project in the long run and that we also believe that the city will continue to do everything it can to erase the combat zone by encouraging more redevelopment, of the area. Our project will go a long way towards helping that process.

I should underline, Mr. Mayor, that this project is not black or white, but that we have decided to take this risk and we hope that the final outcome will be in our

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

CAMPEAU

CORPORATION

320 Bay Street, Toronto, Ontario M5H 2P2 Telephone (416) 868-6460

favor, but I want you to appreciate that we know that we have a risk.

In order to expedite the zoning process this Spring, I agreed with your proposal and desire to further build more low cost housing in the Boston area, which I thought was very good, and we are committed to go ahead and help you with housing along the plans that I discussed with you this Spring or some other variation at your choice.

Mr. Mayor, I have great affection for the city of Boston - I told you that before. I feel you have done a great deal to preserve its heritage and since we have a big stake in the Boston area throughout the entire state. We are anxious to make our project a major success for the city of Boston. I am sure you can appreciate, Mr. Mayor, that by committing our effort at

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

CAMPEAU

CORPORATION

320 Bay Street, Toronto, Ontario M5H 2P2 Telephone (416) 868-6460

the present time to this project and committing Bloomingdale's to it, it must come to a fruitful conclusion very soon because in the meantime, there are other opportunities which we are passing by.

I am wondering if Mr. Coyle has been influenced by the recent article that appeared in The Wall Street Journal, which was extremely unfair, and totally inaccurate.

I am enclosing herewith a copy of our 10-K and a copy of our 10-Q, which were approved by the Board of Directors on December 11. The numbers speak for themselves. We have completed the sale of our assets at the price that we set out to do and not as reported in the Journal. You will notice that the numbers reflect a much more substantial profit than last year, even thought we had flat sales and

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

CAMPEAU

CORPORATION

320 Bay Street, Toronto, Ontario M5H 2P2 Telephone (416) 868-6460

were feeling the effects of having gone through a major takeover.

We expect the company to perform well next year for two reasons: In 1988, sales were projected to increase by 5-6%, the reason the projections were not met was because of the takeover disruption and steamlining. By the middle of the summer, we were quite under water. Since September we have come up very fast and we hope to finish slightly ahead of flat sales by December. Also, our streamlining is now complete, and annual savings should exceed $300 million per year.

The Journal reported also that we had a $10 billion debt. Wrong again, the debt in Campeau Canada is approximately $1.5 billion, and the debt in Federated/Allied about $6 billion. I should point out,

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

CAMPEAU

CORPORATION

320 Bay Street, Toronto, Ontario M5H 2P2 Telephone (416) 868-6460

however, that the retail operations in the United States are on a stand alone basis. Campeau is a real estate development corporation which has done many large projects and we have just completed one of the most major office towers in Toronto, of 2.5 million square feet. I have extended an invitation to you to visit some of my projects and hope we will still have the opportunity to visit with you in Canada and the United States.

I want to confirm again to you, Mr. Mayor, that we are committed to this project. We hope that the zoning can be completed by mid 1989 to allow construction to start. I want to take this opportunity to wish you and your family a Merry Christmas and Happy New Year.

/sm
Attachments

ROBERT CAMPEAU

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

PRESIDENT DU CONSEIL ET DIRECTEUR GENERAL

APPENDIX H

December 30, 1988

Mr. Robert Campeau
Chairman and Chief Executive Officer
Campeau Corporation
320 Bay Street
Toronto, Ontario

Dear Mr. Campeau:

On behalf of the City and in response to your letter to Mayor Flynn, I would like to reconfirm our intent to work with your organization on the Boston Crossing project. The Campeau Corporation is to be commended for its development concept and for its retail plan for the area. As part of the Midtown Cultural District, the project will not only benefit from the district's economic potential, but could be an integral part of its renaissance.

Although the project is generally well conceived, several issues need to be worked out as part of the normal development review process. Of particular concern are the proposed height of the Hayward Place office tower and the size and massing of the Summer Street component.. Recent discussions with Len McQuarrie have been very helpful in our effort to resolve these concerns. I know you understand our desire for a project

that Boston and the Campeau Corporation can look to with pride.

Regarding your stated concern over the price of the Hayward Place parcel, once the development review process is complete, the City's parcel can be sold for its fair reuse value, determined through appraisal, using all relevant factors, including existing zoning as well as constraints on the overall development site as a guide. Such a sale is subject to the approvals of the Real Property Board, the City Council, and the Mayor.

By their own terms, prior agreements on Hayward Place will expire on January 1, 1989. This event does not in our judgment alter our willingness to work with you and your representatives to develop the Boston Crossing project. It simply puts the question of the disposition of Hayward Place in a current context.

It is anticipated that the development review process and Land Disposition Agreement negotiations can be completed in the coming year. With your continued cooperation, we believe we can work out the terms necessary for the Campeau Corporation to go forward with the Boston Crossing project.

The project is exciting and can be very beneficial for Boston and accordingly will

be given careful attention and assistance. Given the considerable work to date, it would be unfortunate for your project not to go forward. You have our commitment to work collaboratively on the Boston Crossing project and the Midtown Cultural District Plan.

Sincerely,

Stephen Coyle

cc: Mr. John P. Boorn
Mr. Lenard McQuarrie

APPENDIX I

TRIPARITE AGREEMENT

AMONG

CITY OF BOSTON

BOSTON REDEVELOPMENT AUTHORITY

AND

LAFAYETTE PLACE ASSOCIATES

dated
December 22, 1978

CONTENTS

ARTICLE I

DEFINITIONS

Section 1.01	Air Rights	. . . . .
Section 1.02	Air Rights Deed and Agreement	. . . . .
Section 1.03	Alstores Realty Corporation	. . . . .
Section 1.04	City-BRA Agreement	. . .
Section 1.05	Chapter 121A	. . . . .
Section 1.06	Closing Date	. . . . .
Section 1.07	Code	. . . . .

Section 1.08	Design Review Process .
Section 1.09	Development Program . .
Section 1.10	Hayward Place Garage .
Section 1.11	Institutional Lender . . . .
Section 1.12	Jordan Marsh Facility . .
Section 1.13	Maintenance and Easement Agreement . . .
Section 1.14	Master Schedule . . . . .
Section 1.15	Mortgagee . . . . .
Section 1.16	Parking Garage . . . . .
Section 1.17	Passageway . . . . .
Section 1.18	Plan . . . . .
Section 1.19	Project . . . . .
Section 1.20	Project Area . . . . .
Section 1.21	Project Rights . . . . .
Section 1.22	Public Improvements . . .
Section 1.23	Public Utilities . . . . .
Section 1.24	Sale and Construction Agreement . . . . .
Section 1.25	Substantial Completion .
Section 1.26	Truck Ramp . . . . .

ARTICLE II

LAND ASSEMBLY

Section 2.01	Land Acquisition . . . . .

ARTICLE III

PRE-CLOSING ACTIVITIES; CLOSING DATE; AIR RIGHTS DISPOSITION

Section 3.01 Pre-Closing Activities . .
Section 3.02 Closing Date . . . . . .
Section 3.03 Conditions . . . . . .
Section 3.04 Air Rights Disposition . .

ARTICLE IV

DEVELOPER'S IMPROVEMENTS

Section 4.01 Development Program . .
Section 4.02 Works of Art . . . . . .
Section 4.03 Design Review Process .
Section 4.04 Development . . . . . .
Section 4.05 Diligent Prosecution . . .
Section 4.06 Certificate(s) of Completion . . . . . .
Section 4.07 Local Employment . . . . .
Section 4.08 Staging Area . . . . . .

ARTICLE V

PUBLIC IMPROVEMENTS

Section 5.01 Program for Public Improvements . . . . . .
Section 5.02 Environmental Approvals
Section 5.03 Cost of Parking Garage .
Section 5.04 Design of Certain Public Improvements . . . . . .
Section 5.05 Construction . . . . . .
Section 5.06 Operation and Maintenance of Parking

	Garage and Hayward Place Garage . . . . .
Section 5.07	Plaza, Malls and Circulation System . . . . .
Section 5.08	Parking Garage Budget; Plaza Malls and Circulation System Budget
Section 5.09	Maintenance of Other Public Improvements . . .

ARTICLE VI

PARCELS D-1, D-2, D-3 AND D-4; PARCEL E

Section 6.01	Demolition of Hayward Place Garage . . . . .
Section 6.02	Right to Acquire Parcels D-1, D-2, D-3 and D-4 . .
Section 6.03	Right to Acquire Parcel E

ARTICLE VII

CONSTRUCTION STANDARDS; INSURANCE

Section 7.01	Construction Standards .
Section 7.02	Insurance During Construction . . . . .

ARTICLE VIII

ZONING AND LAND USE

Section 8.01 Zoning and Land Use of Project Area . . . . . .
Section 8.02 Zoning of Adjacent Parcels . . . . . .

ARTICLE IX

ASSIGNMENT

Section 9.01 Selection of Developer . .
Section 9.02 Prohibited Transfers . . .
Section 9.03 Permitted Transfers . . . .
Section 9.04 Authority's Consent . . . .
Section 9.05 Excepted Transfers . . . .

ARTICLE X

EXHIBITS

Section 10.01 Exhibits . . . . . .

ARTICLE XI

DEFAULT

Section 11.01 Event of Default . . . . . .
Section 11.02 Default by the Developer
Section 11.03 Rights of Mortgagees . . .
Section 11.04 Authority's Right to Purchase . . . . . .

Section 11.05 Default by the City or the Authority . . . . . .

ARTICLE XII

CONDITIONS TO DEVELOPER'S OBLIGATIONS

Section 12.02 Conditions to Developer's Obligations . . . . . .
Section 12.03 Termination for Failure of Conditions . . . . . .

ARTICLE XIII

FAIR MARKET VALUE

Section 13.01 Fair Market Value . . . . .

ARTICLE XIV

SALE AND CONSTRUCTION AGREEMENT

Section 14.01 Coordination with Developer . . . . . .

ARTICLE XV

MISCELLANEOUS

Section 15.01 Governing Law . . . . . .

Section 15.02	Captions and Headings .
Section 15.03	Consents and Approvals
Section 15.04	No Waiver . . . . .
Section 15.05	Alternatives to Sale of Air Rights . . . . .
Section 15.06	Notices . . . . .
Section 15.07	Force Majeur . . . . .
Section 15.08	Invalidity of Provisions .
Section 15.09	Rights of Others . . . . .
Section 15.10	Survival of Obligations .
Section 15.11	Time of Essence . . . . .
Section 15.12	Duration of Plan . . . . .
Section 15.13	Real Estate Taxes . . . . .
Section 15.14	Supplemental Documents
Section 15.15	Superseding Effect . . . . .
Section 15.16	Speedy Trial . . . . .
Section 15.17	Operating Covenant . . . .

EXHIBITS

A	Site Plan
B	Cooperation Agreement
C	Master Schedule
D	Development Program
E	Design Review Process
F	New Essex Street Layout and Other Street Improvements
G	New Essex Street and Bedford Street Improvements
H	Construction Manager Terms
I	Bedford West Urban Renewal Plan

TRIPARTITE AGREEMENT

AGREEMENT made as of this 22nd day of December, 1978 by and among the CITY OF BOSTON, a municipal corporation ("City"), acting by and through its Mayor and its Real Property Board, the BOSTON REDEVELOPMENT AUTHORITY, a public body politic and corporate organized under the laws of the Commonwealth of Massachusetts ("Authority"), and LAFAYETTE PLACE ASSOCIATES, a general partnership (the "Developer") whose partners are Mondev Mass., Inc., a Massachusetts corporation, and Sefrius Corp., a Delaware corporation.

W I T N E S S E T H:

WHEREAS, with the assistance of the federal, state and city governments, the Authority is carrying out the Bedford West Urban Renewal Project pursuant to the Bedford West Urban Renewal Plan approved by the Authority on February 8, 1973, by the Boston City Council on April 23, 1973, by the Mayor of Boston on April 30, 1973, by the Massachusetts Department of Community Affairs on May 23, 1973, as amended by proclaimer dated May 2, 1974, and recorded at Suffolk County Registry of Deeds, Book 8777, Page 650;

WHEREAS, the City, the Authority and Developer desire to carry out the

proposed development sometimes known as Lafayette Place;

WHEREAS, the aspects of the Project will be located in air rights within, above and contiguous to three parcels of land (Parcels A, B and C) and portions of certain streets to be discontinued, all of which parcels and streets are to be acquired by the City and are shown on the plan annexed hereto and marked Exhibit A;

WHEREAS, incident to the Project the City will enter into arrangements for the acquisition of five additional parcels of land and improvements thereon and the discontinuance and acquisition of streets adjacent thereto, which parcels are designated Parcels D-1, D-2, D-3, D-4 and E which parcels and streets are shown on Exhibit A;

WHEREAS, the Bedford West Urban Renewal Project is a part of the Project;

WHEREAS, the City and the Authority have entered into the Cooperation Agreement annexed hereto and marked Exhibit B and pursuant to which the City and the Authority have agreed to take certain actions in furtherance of the Bedford West Urban Renewal Project;

WHEREAS, certain public improvements are to be constructed by the City and the Authority incident to the Project;

WHEREAS, the City and the Authority have determined that the Project and the aforesaid public improvements are in the best interests of the City and the public good and welfare;

WHEREAS, the City, acting by and through its Real Property Board, has determined that the Parking Garage to be undertaken by its pursuant to this Agreement and its relationship to the Project is reasonable and in furtherance of Chapter 474 of the Acts of 1946, as amended, and special acts supplementing the power of the Real Property Board under said Chapter 474, as amended;

WHEREAS, the City, acting by and through its Real Property Board, has determined that said Parcels A, B, C, D-1, D-2, D-3 and D-4 and Parcel E (as shown on Exhibit A), are appropriate for parking facilities but that such portions of such Parcels as are not devoted to parking facilities and facilities in support thereof constitute surplus air-space unnecessary or inappropriate for parking facilities above, within or contiguous to the parking facilities to be constructed pursuant to this Agreement;

WHEREAS, the Developer intends to form a partnership under Chapter 121A of the General Laws and Chapter 652 of the Acts of 1960, as amended, and to undertake certain of the non-public portions of the Project in accordance therewith, thereby serving public uses by eliminating decadent and substandard areas, providing increased employment opportunities for the citizens of the City, stabilizing land values in the area, and assuring the City of needed revenue;

WHEREAS, the Developer and the City have determined that the benefit of the combined public and private development could not be achieved by private enterprise alone without the aid provided by Chapter 121A of the General Laws and Chapter 652 of the Acts of 1960, as amended;

WHEREAS, Alstores Realty Corporation has constructed and reconstructed certain buildings, all of which together comprise the department store operated under the name of Jordan Marsh and all of which are to be physically and operationally integrated with the Project;

WHEREAS, the Developer and the City have entered into this Agreement and other documents providing for such

integration of the Project and such department store; and

WHEREAS, the City, the Authority and Developer are entering into this Agreement in reliance upon the performance of their various obligations hereunder and the construction by each of them of certain improvements as a part of and incident to the Project.

NOW, THEREFORE, in consideration of the mutual promises herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

. . .

ARTICLE VI

PARCELS D-1, D-2, D-3 AND D-4; PARCEL E

. . .

Section 6.02. Right to Acquire Parcels D-1, D-2, D-3 and D-4. In the event that the City shall determine to discontinue the Hayward Place Garage, the Developer and its successors and affiliates (as defined in Section 9.03. j) hereof) are hereby given the sole and exclusive right and option on the terms

herein set forth to acquire the unencumbered title to the interest of the City (except that such title shall revert to the City one hundred (100) years and one (1) day from the date of recording of the deed thereof) in parcels D-1, D-2, D-3 and D-4 or, if a subsurface parking facility shall be constructed thereunder, in the air rights over parcels D-1, D-2, D-3 and D-4 and New Essex Street (but only between Harrison Avenue Extension and Washington Street as shown on Exhibit A) and such rights appurtenant thereto as are necessary to make the air rights commercially viable. No sale, transfer or other disposition of any such rights shall be made by the City until three (3) years from the date on which the City has finally determined in accordance with law that the Hayward Place Garage is to be discontinued in operation and has given notice to the Developer of such determination and of the extent, if any, to which the City has determined and agrees to create subsurface parking beyond that to which it is obligated hereunder. If within such period (the "Option Period") the Developer shall notify the City that it desires to purchase the rights hereby made available to it then the City shall sell the same (without air rights over New Essex Street, if the Developer shall so elect) to the Developer, its successors or its affiliates.

The City has obtained appraisals which it has determined are acceptable to it and which set forth the current fair market values of Parcels D-1 and D-2 and shall forthwith after the date of this Agreement obtain likewise acceptable appraisals for the current fair market values of Parcels D-3, D-4 and relevant interests in New Essex Street. Forthwith after the same are available, the City shall give copies of such appraisals to the Developer. The purchase price to be paid hereunder shall, if subsurface rights are not retained by the City, be the fair market values shown by such appraisals plus one-half (1/2) of the increase, if any, in such values as the result of construction of the Public Improvements and the Project. The purchase price to be paid hereunder shall, if subsurface rights are retained by the City, be one-half (1/2) of the fair market values shown by such appraisals plus one-half (1/2) of the increase, if any, in such values as the result of construction of the Public Improvements and the Project. The existence and amount of increase in fair market values attributable to the construction of the Public Improvements and the Project shall be determined by independent appraisal.

As aforesaid, the Developer may exercise the right and option set forth in this Section 6.02 by giving notice of its desire to purchase such rights to the City

at any time within the Option Period. After the receipt of and following such notice from the Developer, the parties shall in good faith negotiate and enter into an agreement calling for the purchase and sale of the rights in question. Such agreement shall be in the customary form of agreements for the purchase and sale of real estate in the greater Boston area except that the agreement shall reflect such reservation and shall contain other appropriate provisions with respect to the integration of construction and other matters relevant to coordinated use of the rights conveyed and the rights retained by the City. Any such purchase and sale agreement may provide for a closing date extending up to six (6) months after the end of the Option Period and the expiration of the Option Period in any event shall not affect the rights of the Developer to proceed with an acquisition if notice of the exercise of such rights has been given prior to the expiration thereof, provided that, the Developer shall lose its rights hereunder to proceed with an acquisition if, because of a failure of the Developer to work in good faith to conclude a purchase and sale agreement or to perform thereunder, a closing has not occurred within six (6) months after the end of the Option Period, unless the City and the Developer shall agree to a further extension. Notwithstanding the foregoing, in all cases the Developer's

rights hereunder shall extend for such period of time as may be necessary for the City to substantially complete construction of any subsurface parking facilities for which the City is or may become obligated hereunder.

Prior to the construction of any additional subsurface parking facilities on Parcels D-1, D-2, D-3 or D-4 and prior to disposition of such rights to the Developer, its successors or affiliates, the City may use the surface of the land for parking so long as the same is operated and maintained to the highest standards and in keeping with the character of the Project. A conveyance under this Section 6.02 to the City which results in a reduction in the number of parking spaces in the Project Area shall not render the City in default under this Agreement.

Section 6.03. Rights to Acquire Parcel E. The City agrees to demolish the garage known as the Lincoln-Essex Parking Garage and designated on Exhibit A. Such demolition shall commence no later than the date on which the Parking Garage shall be available for occupancy and demolition shall be expeditiously completed once started. Pursuant to understandings that the City has orally reached (and hereby agrees to exercise best efforts to confirm in writing) with Boston Edison Company, it is expected

that the City shall acquire from Boston Edison Company Parcel E and the air rights over the adjacent, existing substation in exchange for the unencumbered fee simple absolute interest in the parcel of real estate from which the Lincoln-Essex Parking Garage will have been cleared. Such exchange shall occur as soon as possible after the completion of demolition of the Lincoln-Essex Parking Garage.

The Developer and its successors and affiliates are hereby given the sole and exclusive right and option to acquire unencumbered fee simple absolute of the City in Parcel E and such air rights over said substation (less areas retained by the City for street purposes) for a period which begins on the date hereof and ends on the last to occur of five (5) years from the date on which the City shall satisfy its obligations to acquire title to Parcel E and such air rights over said substation or twelve (12) months from the date of issuance of all certificates of completion permitted under Section 4.06 hereof. However, if the City shall determine and agree to construct subsurface parking under Parcel E the acquisition right and option shall be limited to a right and option to purchase the air rights above Parcel E and such subsurface parking and over said substation and such rights appurtenant thereto as are necessary or

appropriate to make the air rights commercially viable.

The City shall within thirty (30) days after the date on which the City Council shall approve this Agreement cause an appraisal to be made of the fair market value of Parcel E (less any areas proposed to be retained for future street purposes) and such air rights over said substation as of such date. The purchase price to be paid hereunder shall, if subsurface rights are not retained by the City, be the fair market value shown by such appraisal plus one-half (1/2) of the increase, if any, in such value as the result of construction of the Public Improvements and the Project. The purchase price to be paid hereunder shall, if subsurface rights are retained by the City, be one-half (1/2) of the fair market value shown by such appraisal plus one-half (1/2) of the increase, if any, in such value as the result of construction of the Public Improvements and the Project. The existence and amount of increase in fair market value attributable to the construction of the Public Improvements and the Project shall be determined by independent appraisal.

The Developer's (or its successors' or affiliates') exercise of the right and option set forth in this Section 6.03 shall be undertaken with the benefit of all time

periods and in the same manner as it is entitled to exercise the right and option provided under Section 6.02, above. If under either of such Sections the City has determined and agreed to construct subsurface parking facilities then the City shall forthwith thereafter perform such construction in order that the acquisition rights of the Developer (or its successors or affiliates) hereunder may be availed of on a timely basis.

. . .

ARTICLE XIII

FAIR MARKET VALUE

Section 13.01. Fair Market Value. The term "Fair Market Value" as used in this Agreement means the price, as of the Notice Date, which a seller, willing but not obligated to sell, would accept for the Project Rights, and which a buyer, willing but not obligated to buy, would pay therefor in an arms' length transaction. Fair Market Value shall be determined in accordance with the following procedure.

Either party may give written notice to the other party and in such notice shall designate the first appraiser (the "First Appraiser"). Within fifteen (15) days after the service of such notice, the other party

shall give written notice to the party giving the first notice, which notice shall designate the second appraiser (the "Second Appraiser"). If the Second Appraiser is not so designated with or by the time above specified, then the party designating the First Appraiser may request appointment of the Second Appraiser by the Chief Judge of the United States District Court for the District of Massachusetts or any successor federal court of original jurisdiction but if such Chief Judge shall not act then appointment may be requested of the President of the Boston Bar Association. The First and Second Appraisers so designated or appointed shall appoint a third appraiser (the "Third Appraiser") and if they shall be unable to agree upon such appointment within ten (10) days after the time aforesaid, the Third Appraiser shall be selected by the parties themselves, if they can agree thereon within a further period of fifteen (15) days. If the parties do not so agree, then either party, on behalf of both, may request that such appointment be made by the Chief Judge of the United States District Court for the District of Massachusetts or any successor federal court of original jurisdiction. In the event of the failure, refusal or inability of any appraiser to act, a new appraiser shall be appointed in his stead, which appointment shall be made in the same manner as hereinbefore provided for the appointment

of such appraiser so failing, refusing or being unable to act. Each party shall pay the fees and expenses of the appraiser appointed by such party, or in whose stead, as above provided, such appraiser was appointed, and the fees and expenses of the Third Appraiser, and all other expenses, if any, shall be borne equally by both parties. Any appraiser designated to serve as above provided, shall be disinterested, and shall be familiar with property values in metropolitan Boston, Massachusetts. The appraisers shall determined the Fair Market Value of the Project Rights. A decision joined in by two of the three appraisers shall be the decision of all the appraisers. After reaching a decision, the appraisers shall give written notice thereof to the parties hereto which notice shall in reasonable detail state the Fair Market Value so determined and the factors considered by the appraisers in making such determination, and the Fair Market Value so stated shall be considered Fair Market Value for the purposes of this Agreement and shall be final and binding upon such parties. If the appraisers shall fail to reach a decision within ninety (90) days (or such further time as may reasonably be requested by either party and approved by the other) after the appointment of the third appraiser, either party may make application to any court of competent

jurisdiction for a determination by such court of Fair Market Value.

. . .

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals as of the day and year first above written.

APPROVED AS TO FORM:

\s\ illegible
Corporation Counsel
City of Boston

CITY OF BOSTON

By \s\ Kevin H. White
Kevin H. White
Mayor

APPROVED AS TO FORM:

\s\ illegible
General Counsel
Boston Redevelopment Authority

CITY OF BOSTON
By: Real Property Board

By \s\ Joanne A. Prevost
Joanne A. Prevost
Commissioner of Real
Property Board
Chairman of Real
Property Board

WITNESS:

\s\ illegible

BOSTON REDEVELOPMENT
AUTHORITY

By \s\ illegible
Director

WITNESS:

\s\ illegible

LAFAYETTE PLACE ASSOCIATES
By: Mondev Mass., Inc.
general partner

By \s\ illegible
Its Vice President

WITNESS:

\s\ illegible

By: Sefrius Corp.
general partner

By \s\ illegible
Its President